

**Sarkar, Rumu, CIV, WSO-BRAC**

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**From:** Sarkar, Rumu, CIV, WSO-BRAC  
**Sent:** Tuesday, June 07, 2005 6:53 PM  
**To:** Hague, David, CIV, WSO-BRAC  
**Cc:** Cowhig, Daniel J MAJ ARBA  
**Subject:** FW: BRAC timing, cost savings, and classified access

Sir: I have a very partial answer to the question posed by Commissioner Coyle which is why I hesitate to contact all the persons copied on his original query without your looking through the sufficiency of this response.

In response to the question of whether the BRAC Commission is required as a matter of law to reject DoD's proposed closures and realignments that cannot be implemented within the statutory six-year time limit, there is no definitive legal answer that I can see, but several interpretations of this requirement can be made and implemented as the Commissioners see fit. As a preliminary matter, the six-year implementation requirement stems from Section 2904(a)(5) of the 1990 BRAC law, P.L. 101-510, as amended by P.L. 107-107, that states as follows:

"the Secretary shall complete all such closures and realignments no later than the end of the six-year period beginning on the date on which the President transmits the report pursuant to section 2903(e) containing the recommendations for such closures or realignments."

The transmission to Congress by the President may be made between September 8-23, 2005 or, in any event, no later than November 7, 2005. (Failure to do so by that date terminates the BRAC 2005 process.) Thus, the closures and realignments must be made no later than November 7, 2011. There is no requirement in the BRAC statute specifying that proposed closures and realignments not completed by the six-year allotted time MUST be rejected by the BRAC Commission, but Section 2903(d)(2)(B) of the BRAC statute permits the Commission to "make changes to any of the recommendations made by the Secretary if the Commission determines that the Secretary deviated substantially. . . in making recommendations."

Item 5 of the final section criteria issued by the SecDef states that, "[t]he extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs," will be taken into consideration in making recommendations for closure. This implies that if the closure cannot be completed within the prescribed six-year period, then the amount and timing of potential costs savings cannot be accurately calculated. While this may not mandate a rejection of such a proposal, the Commission would certainly be within its scope of its statutorily defined duty to find that this proposal does not adequately meet the final criteria.

While this issue has not been squarely addressed by prior BRAC litigation, the closest discussion that I could find on this issue was in the *Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F.Supp. 2d 582, 588 (E.D. Va. 1999), that states: "In accordance with the Base Closure Act, preparations to close NAS Cecil Field had already begun by the time the 1995 BRAC report changed the receiving site . . . Because NAS Cecil Field was first selected for closure in the 1993 BRAC report and most, if not all, finding for the base ceases after that time. . . . Because the F/A-18 relocation must be completed less than two years after the ROD was issued, the Navy moved quickly to implement the decision."

This implies that that the Cecil Field closure was implemented despite the shortened amount of time available to the Navy. Thus, it seems that the deadline for closure was ultimately met through Navy action. Thus, if a proposed closure or realignment that cannot be completed within the six-year statutory period, the Commission may reject (but may not be absolutely required to reject as a matter of law) any recommendation that cannot be completed within that timeframe.

Please let me know if you wish to discuss this further, Rumu

-----Original Message-----

From: Philip Coyle [mailto:martha.krebs@worldnet.att.net]

DCN: 12178

Sent: Saturday, May 28, 2005 12:50 AM

To: Battaglia, Charles, CIV, WSO-BRAC; Principi, Anthony, CIV, WSO-BRAC; 'skinners@gtlaw.com'; Hague, David, CIV, WSO-BRAC; 'jbilbray@kkbr.com'; 'Martha.krebs@att.net'; 'jangehman@aol.com'; 'jvh@jimhansenassociates.com'; 'Hillttmg1@aol.com'; 'lloyd.newton@pw.utc.com'; 'bgtutner@satx.rr.com'  
Cc: Cowhig, Dan, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC  
Subject: BRAC timing, cost savings, and classified access

Dear Mr. Battaglia: The visits that Mr. Bilbray and I made to Portland IAP AGS, to McChord AFB, and to Umatilla Chemical Depot were very informative and illuminated a number of important issues.

I'll just take a moment to mention three issues that you and/or Gen. Hague may be able to clarify or want to pursue:

1. The Installation Commander and his staff at Umatilla Chemical Depot told us in no uncertain terms that they will not be able to complete the incineration of all of the chemical weapons at Umatilla within the six years required for BRAC 2005. In fact it appears that they will not meet the schedule for completing the destruction of these weapons required under the Chemical Weapons Treaty either, and will have to request another extension.

No doubt the Russians will have the same problem.

This raises the question is the Commission required under law to disapprove a DOD BRAC recommendation if the Commission finds that the action cannot be completed in six years?

2. From our visit to McChord AFB it appears that the DOD projected cost savings are highly unrealistic and that this situation may pertain at other bases where "joint basing" is being recommended. While I'm sure all the Commissioners support Jointness in principle, for the purposes of BRAC 2005, joint basing was recommended by the DOD for its supposed cost savings. The people at McChord AFB believe that an overall target - a bogey - was set for joint basing cost savings across the nation, that those "savings" were then allocated to those bases being recommended for joint basing, and that from these dollar "savings" personnel cuts required to achieve these savings were calculated and levied. The people at McChord AFB said they had not been consulted about whether or not these savings could be realistically achieved.

By contrast, the savings were NOT generated by a cooperative effort between McChord AFB and Fort Lewis, studying common base support or medical functions that might be consolidated, and deriving realistic savings from those joint actions.

While the situation is quite different at Umatilla, the cost savings projected by the DOD there also do not appear to be achievable since Umatilla has no mission that might generate cost savings. Chemical agent demil seems to always take longer and cost more than expected, not less, and Umatilla has no other mission.

If we find this to be the case at other bases recommended for closure or realignment, it could impact our views regarding the wisdom behind a number of DOD recommendations.

3. The DOD put out a letter to Senator Warner and a legislative update today - see attached - announcing that the DOD staff will make the entire digital database, including classified portions, accessible on computers in a secure reading room in Crystal City near the BRAC Commission offices. The DOD plans to have this material available by Tuesday evening, May 31st.

This raises the question can members of the military or defense contractors with proper clearances access these classified materials at the Commission reading room?

Best regards,

Phil

Philip E. Coyle, III  
2139 Kew Drive  
Los Angeles, CA 90046  
Tel 323-656-6750  
Fax 323-656-6240

"DCN: 12178

E-mail Philip Coyle <martha.krebs@att.net>



**Final Selection Criteria**  
**Department of Defense Base Closure and Realignment**

In selecting military installations for closure or realignment, the Department of Defense, giving priority consideration to military value (the first four criteria below), will consider:

***Military Value***

1. The current and future mission capabilities and the impact on operational readiness of the total force of the Department of Defense, including the impact on joint warfighting, training, and readiness.
2. The availability and condition of land, facilities, and associated airspace (including training areas suitable for maneuver by ground, naval, or air forces throughout a diversity of climate and terrain areas and staging areas for the use of the Armed Forces in homeland defense missions) at both existing and potential receiving locations.
3. The ability to accommodate contingency, mobilization, surge, and future total force requirements at both existing and potential receiving locations to support operations and training.
4. The cost of operations and the manpower implications.

***Other Considerations***

5. The extent and timing of potential costs and savings, including the number of years, beginning with the date of completion of the closure or realignment, for the savings to exceed the costs.
6. The economic impact on existing communities in the vicinity of military installations.
7. The ability of the infrastructure of both the existing and potential receiving communities to support forces, missions, and personnel.
8. The environmental impact, including the impact of costs related to potential environmental restoration, waste management, and environmental compliance activities.



ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

**THE UNDER SECRETARY OF DEFENSE**

3010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3010

**JAN 4 2005**

**MEMORANDUM FOR INFRASTRUCTURE EXECUTIVE COUNCIL MEMBERS  
INFRASTRUCTURE STEERING GROUP MEMBERS  
JOINT CROSS-SERVICE GROUP CHAIRMAN**

**Subject: 2005 Base Closure and Realignment Selection Criteria**

The Ronald Reagan National Defense Authorization Act for Fiscal Year 2005, Public Law 108-375, amended the Defense Base Closure and Realignment Act of 1990, Public Law 101-510, to specify the selection criteria. Specifically, the amendment revised the criteria previously published by the Secretary of Defense by adding the word "surge" to criterion three. The amendment also revised the wording, but not the meaning, of criteria one and seven, to avoid the use of the possessive.

The Department shall use the attached 2005 Base Closure and Realignment (BRAC) Selection Criteria, along with the force-structure plan and infrastructure inventory, to make recommendations for the closure or realignment of military installations inside the United States, as defined in the base closure statute. This direction supersedes any previous direction regarding selection criteria for the BRAC 2005 process. The 2005 BRAC Commission will also use these criteria in their review of the Department of Defense's final recommendations.

A handwritten signature in black ink, appearing to read "Michael W. Wynne".

Michael W. Wynne  
(Acting USD (Acquisition, Technology & Logistics))  
Chairman, Infrastructure Steering Group

Attachment:  
As stated





### BRAC Commission Routing Form

**From:**

Mr. Charles Battaglia, Executive Director

*5/29/05*

**To:**

\_\_\_\_\_ Diane Carnevale, Director of Admin/Operations

\_\_\_\_\_ Frank Cirillo, Director of Review and Analysis

\_\_\_\_\_ David Hague, General Counsel

\_\_\_\_\_ Christine Hill, Director of Congressional Affairs

\_\_\_\_\_ Jim Schaefer, Director of Communications

**Required Action:**

Action Item (Log # \_\_\_\_\_ )

Deadline: *June 6*

Comments:

*Please take Commission's  
question for action*

\_\_\_\_\_ For Review

Comments:



DCN: 12178

This raises the question can members of the military or defense contractors with proper clearances access these classified materials at the Commission reading room?

Best regards,

Phil

Philip E. Coyle, III  
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Los Angeles, CA 90046  
Tel 323-656-6750  
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## Office of the Assistant Secretary of Defense: Legislative Affairs

### *Legislative Update*

#### **Release of additional BRAC information**

**The Department of Defense is making additional BRAC information available for review by the BRAC Commission and Congress.**

- In compliance with the BRAC statutes, the Department of Defense provided its recommendations to the BRAC commission and Congress on May 13<sup>th</sup>. Additionally, the following data has been provided to the Commission and Congress:
  - The classified force structure plan (Volume 2 of the Department's recommendation);
  - Reports by the Military Departments and the Joint Cross Service Groups (Volumes 3-12);
  - 222 BRAC recommendation binders, containing the Department's analysis of each recommendation against all eight selection criteria;
  - Cost of Base Realignment Action Model with static data;
  - Installation imagery of bases to be visited; and
  - Testimony to the Commission by senior DoD officials.

**To further support the Commission's and the public's understanding of the Department's recommendations, the Department is preparing to submit a general database pertaining to all U.S. facilities by close of business on May 31<sup>st</sup>.**

- The volume of this supplementary data is more than 100 times greater than for previous BRAC rounds.
- As in previous base realignment and closure rounds, the Department is establishing handling procedures for the general database.
  - The database is entirely digital and contains some classified information. For that reason, the entire database must be treated as classified while DoD continues to process of declassifying substantial portions of it.
- DoD staff will make the entire digital database accessible on computers in a secure reading room in Crystal City near the BRAC Commission offices. We plan to have this material available by Tuesday evening, May 31<sup>st</sup>. Consistent with prior BRAC rounds, we are working with Congressional staff to establish a similar secure reading room on Capitol Hill.
- The entire digital database will be made available to the commission, to Members of Congress, and to Congressional staff with "SECRET" clearances.



## Office of the Assistant Secretary of Defense: Legislative Affairs

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### *Legislative Update*

- The public, through the BRAC Commission, will have access to all unclassified information by Saturday, June 4.
- Unlike previous BRAC rounds, the Department will have a simultaneous process of rapid declassification of information on the database as appropriate should community representatives desire such information and should it be determined to be eligible for rapid declassification.
- The Department believes the full volume of data available to the Congress, the BRAC commission, and the public will be substantially greater than was made available in prior BRAC rounds.



## DEPUTY SECRETARY OF DEFENSE

1010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1010

May 27, 2005

The Honorable John Warner, Chairman  
Committee on Armed Services  
United States Senate  
Washington, D.C. 20510-6060

*Mr. Chairman*  
Dear Chairman Warner:

As a follow up to our phone conversation yesterday and your correspondence of May 26, this letter outlines the manner in which DoD is meeting the requirements of the law governing the transparency of the BRAC process.

A list of the Department's closure and realignment recommendations was delivered to the Commission and Congress on May 13, three days in advance of the statutory May 16 deadline. Additionally, a summary of the selection process that resulted in the recommendations, including a justification for each recommendation, was included in Volume 1 of the Department's BRAC report. This information was due to the Commission and to the Congress within seven days. It was delivered to the Commission and to the Congress and posted on the Department's BRAC website on May 13.

In addition to the Department's initial legal submission, to further support the Commission's and the public's understanding of the Department's recommendations, the Department has already provided significant information including:

- the classified force structure plan (Volume 2);
- reports by the Military Departments and the Joint Cross Service Groups (Volumes 3 through 12);
- 222 recommendation binders containing the Department's analysis of each recommendation against all eight selection criteria;
- Cost of Base Realignment Action Model with static data;
- installation imagery of bases to be visited; and
- testimony to the Commission by senior DoD officials.

The Department is also preparing to submit, early next week, the minutes reflecting its deliberative record and the extensive volume of data underpinning its recommendations. The statute does not establish a time by which the Department must make this information available to the Commission and Congress, but we will make it available by close of business on May 31.

As with prior rounds of BRAC, because this supplementary information includes classified material that requires appropriate handling, the Department is establishing handling procedures for this supplementary information.



Unlike prior BRAC rounds, however, the extent of this supplementary information is unprecedented in terms of volume, level of detail, and electronic access. The volume alone is vastly larger than that collected in prior BRAC rounds. Accordingly, the Department has established handling procedures appropriate to the size and sensitivity of the database.

During prior BRAC rounds, the Commission and the congressional defense committees established reading rooms in which files of this supporting data were maintained. Some of this supplementary data in previous BRAC rounds was classified, and that is true with this BRAC round, too.

During our discussions with committee staffs in the period leading up to the completion of the Department's recommendations, committee staffs expressed a desire to include as much of the supplementary data in electronic form as feasible, which we are doing. Because the data are only in digital form, unlike prior BRAC rounds, the fully aggregated database is temporarily classified SECRET while we proceed with the process of disaggregating and declassifying substantial portions of it.

We intend to declassify as much of it as possible and to make it available to the public. We believe the full volume of data available to the Congress, the BRAC Commission, and the public will be substantially greater than was made available in prior BRAC rounds.

The plan for making available the supplemental BRAC information is as follows:

- The BRAC Commission, members of Congress, and their respective staffs with SECRET clearances will have access to the entire digital database accessible on computers in a secure reading room in Crystal City near the BRAC Commission offices by Tuesday evening, May 31. Consistent with prior BRAC rounds, we are also working with Congressional staff to establish a similar secure reading room on Capitol Hill.
- The public, through the BRAC Commission, will have access to all unclassified information by Saturday, June 4.
- DoD will expedite interim SECRET clearances as required for Commission and Congressional staff.
- As with previous BRAC rounds, the Department, Commission, and Congress will have appropriate handling procedures for any information that remains classified.





Source: [Legal](#) > [Federal Legal - U.S.](#) > [Federal Cases After 1944, Combined Courts](#) ⓘ  
Terms: **brac w/100 realignment** ([Edit Search](#))

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*12 F.3d 8, \*; 1993 U.S. App. LEXIS 32084, \*\**

COUNTY OF SENECA; SAVE OUR SENECA; KEEP OUR BASE IN ROMULUS ALIVE; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2546; SENECA COUNTY INDUSTRIAL DEVELOPMENT AGENCY, Plaintiffs-Appellees, v. RICHARD CHENEY, as the Secretary of Defense; MICHAEL STONE, as the Secretary of the Army; SUSAN LIVINGSTONE, as the Assistant Secretary of the Army, Defendants-Appellants.

Docket No. 92-6296

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

12 F.3d 8; 1993 U.S. App. LEXIS 32084

March 1, 1993, Argued  
December 9, 1993, Decided

**SUBSEQUENT HISTORY:** [\*\*1] As Amended January 5, 1994.

**PRIOR HISTORY:** Appeal from an order of the United States District Court for the Western District of New York (David G. Larimer, Judge) preliminarily enjoining, pursuant to the Defense Base Closure and Realignment Act of 1990, a proposed reduction in force at the Seneca Army Depot. We issued an order vacating the injunction on March 9, 1993. This opinion explains that decision.

### CASE SUMMARY

**PROCEDURAL POSTURE:** Appellant government sought review of an order from the United States District Court for the Western District of New York, which preliminarily enjoined, pursuant to the Defense Base Closure and **Realignment** Act of 1990 (**BRAC**), 10 U.S.C.S. § 2687, a proposed reduction in force at an army base. Appellant contended that the proposed reduction in force was not a **realignment** subject to **BRAC**.

**OVERVIEW:** Appellees, base closure opponents, obtained an injunction prohibiting appellant government from imposing a reduction in force at a New York Army depot, on the basis that the reduction constituted a **realignment** that violated the Defense Base Closure and **Realignment** Act of 1990 (**BRAC**), 10 U.S.C.S. § 2687. **BRAC** provided that no action for **realignment** involving a reduction of civilian personnel could be taken without obtaining authorization from congress. The court found that appellees offered only a speculative affidavit in support of their claim that the proposed **realignment** would reduce functions and civilian personnel at the army base. In contrast, appellant offered evidence showing the complete elimination of the class of weapons whose storage and maintenance engaged the subject army base's civilian personnel. Because appellees offered no probative evidence that a relocation would take place, the action could not be considered a **realignment**. The court vacated the preliminary injunction, finding that appellees failed to show a likelihood of success on the merits of its claim that the proposed action violated the National Environmental Policies Act.

**OUTCOME:** The court vacated the district court's preliminary injunction, which prohibited

appellant government from imposing a reduction in force at an army base, because appellees, base closure opponents, offered no probative evidence that the proposed realignment would reduce functions and civilian personnel at the army base. Therefore, appellant's reduction in force the army base could not be considered a realignment.

**CORE TERMS:** realignment, personnel, civilian, weapons, preliminary injunction, reduction, closure, military, military installation, recommendation, elimination, industrial, plant, environmental, relocation, threshold, vacated, nuclear weapons, ground-launched, consolidation, installation, tactical, environmental impact statement, likelihood of success, abuse of discretion, reduction in force, human environment, depot, injunction, issuance

**LexisNexis(R) Headnotes** ♦ [Hide Headnotes](#)

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**HN1** ↓ See [10 U.S.C.S. § 2687](#).

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[Governments](#) > [Federal Government](#) > [Employees & Officials](#)   
[Governments](#) > [Federal Government](#) > [U.S. Congress](#) 

**HN2** ↓ Every two years from 1991 to 1995 the Secretary of Defense must submit recommendations for base closures and realignments to the Defense Base Closure and Realignment Commission (Commission). After studying these recommendations, the Commission must submit its own recommendations to the president who, in turn, is to relay his approval or rejection to congress. [10 U.S.C.S. §§ 2903, 2904](#). [More Like This Headnote](#)

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**HN3** ↓ Although an appellate court review a district court's granting of a preliminary injunction for abuse of discretion, it reviews a district court's conclusions of law de novo. An injunction based on an error of law qualifies automatically as an abuse of discretion. [More Like This Headnote](#)

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**HN4** ↓ The term "realignment" includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances. [10 U.S.C.S. § 2910\(5\)](#). An alignment involves the positioning of one group of functions or personnel relative to another group. A realignment thus suggests a transfer, merger, or regrouping of functions and personnel, not an elimination of one particular function with the attendant personnel. [More Like This Headnote](#)

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**HN5** ↓ Under the National Environmental Policy Act, an environmental impact statement or an environmental assessment is not required unless the contemplated action will affect the environment in a significant manner or to a significant extent, with significance defined in terms of both context and intensity. [More Like This Headnote](#)

[Environmental Law](#) > [Environmental Quality Review](#) 

**HN6** ↓ Reductions of civilian personnel staffing levels are defined by the Army as a type of action categorically excluded pursuant to 40 C.F.R. § 1507.3(a), (b)(2)(ii) from the National Environmental Police Act's mandates so long as they fall below the

threshold for reportable actions, will not result in the abandonment of the facility or disruption of environmental services, or do not otherwise require an environmental impact statement or environmental assessment. 32 C.F.R. §§ 651.18 & 651, app.

A-14. [More Like This Headnote](#)

**COUNSEL:** DOUGLAS N. LETTER, United States Department of Justice, Washington, D.C. (Stuart M. Gerson, Assistant Attorney General, Dennis C. Vacco, United States Attorney, Western District of New York, Buffalo, New York, of counsel), for Defendants-Appellants.

EDWARD F. PREMO, II, Rochester, New York (Jane A. Conrad, Harter, Secrest & Emery, Rochester, New York, of counsel), for Plaintiffs-Appellees.

**JUDGES:** Before: NEWMAN and WINTER, Circuit Judges, and CARMAN, Judge, U.S. Court of International Trade. \*

\* The Honorable Gregory W. Carman, Judge of the U.S. Court of the International Trade, sitting by designation.

**OPINIONBY:** WINTER

**OPINION:** [\*9] AMENDED OPINION

WINTER, *Circuit Judge*:

The governmental defendants (hereafter "government") appeal from Judge Larimer's issuance of a preliminary injunction pursuant to the Defense Base **[\*2]** Closure and **Realignment** Act of 1990 ("**BRAC**"), Pub. L. No. 101-510, 104 Stat. 1808, 10 U.S.C. § 2687 note (Supp. III 1991), enjoining a proposed reduction in force ("RIF") at the Seneca Army Depot ("SEAD") in Romulus, New York. Judge Larimer held that the appellees ("Seneca") had demonstrated a likelihood of success on the merits of their claim that the government had circumvented the base closure process by undertaking a "**realignment**" of SEAD without submitting to the procedures specified in **BRAC**. County of Seneca v. Cheney, 806 F. Supp. 387 (W.D.N.Y. 1992), vacated by order, 992 F.2d 320 (2d Cir. 1993). The government argues that the proposed RIF at SEAD is not a **realignment** either because it does not involve the relocation of functions or civilian personnel or because it is a "workload adjustment" and, as such, is specifically excluded from the Act. **BRAC** § 2910(5). Seneca contends that the proposed RIF is a **realignment** and that, even if we rule against them under **BRAC**, the preliminary injunction was justified under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 **[\*3]** et seq. (1988), an issue that Judge Larimer did not reach. County of Seneca, 806 F. Supp. at 413.

Because the government's actions implicate neither **BRAC** nor NEPA, we vacated the preliminary injunction on March 9, 1993. This opinion explains that action.

SEAD is a military installation in Romulus, New York, that stores and maintains conventional and "special" weapons as well as industrial plant equipment necessary for national defense. The special weapons can include ground-launched tactical nuclear weapons. n1 **[\*10]** In connection with these functions, a munitions maintenance unit, the 833d Ordnance Company, had been stationed at SEAD. In addition to the military personnel engaged in these tasks, SEAD has employed 847 civilians, 442 in connection with its special weapons capacity and 143 in connection with its industrial equipment function.

----- Footnotes -----

n1 Department of Defense policy is neither to confirm nor deny the presence of nuclear weapons at specific military installations.

----- End Footnotes-----

In the context of a **【\*\*4】** general reduction in the size of American military forces during 1990 and 1991, the Department of Defense and the Army considered three changes that would impact SEAD. First, they planned to reduce SEAD's special weapons during the period 1991 to 1998. The Army Materiel Command ("AMC") ordered the Depot System Command ("DESCOM") to arrange for the consolidation and storage of the Army's special weapons at a single site, not SEAD. Second, the Department of Defense ordered that all industrial plant equipment functions be performed at Defense Logistics Agency ("DLA") facilities. Because SEAD was not a DLA facility, its industrial plant equipment mission was scheduled to be reduced, resulting in a loss of 122 civilian positions by October 1992. Finally, the 833d Ordnance Company would be deactivated in September 1992.

In August 1991, AMC ordered DESCOM to study the proposed actions in accordance with Army Regulation 5-10 ("AR 5-10") which specifies the procedures required for the reduction of civilian employment by 50 persons or 10%, whichever is less. On September 27, 1991, while this study was proceeding, President Bush ordered the Defense Department to eliminate all ground-launched **【\*\*5】** tactical nuclear forces from the American arsenal. This order reoriented the Army's efforts from consolidation of the special weapons program to total elimination of ground-launched tactical nuclear weapons as a class. Consequently, the Army modified its AR 5-10 proposal to recommend that SEAD be downgraded from a depot to a "depot activity" with the concurrent elimination of the 442 civilian positions with responsibility for special weapons. The total number of civilians employed at SEAD would as a result drop from 847 to 285, a decline of nearly 70%. n2 The Secretary of the Army approved these recommendations on July 2, 1992.

----- Footnotes-----

n2 Civilian employees whose jobs would be eliminated would be eligible for various assistance programs including the Priority Placement Program that aids transfers to other defense facilities and early retirements under the Voluntary Early Retirement Authority.

----- End Footnotes-----

On September 9, 1992, Seneca brought the present action seeking injunctive relief from the proposed RIF on the grounds that it failed **【\*\*6】** to comply with **BRAC**. The authority for the closure and **realignment** of military installations (and certain limitations on that authority) derive from 10 U.S.C. § 2687. It provides that:

**HN1**

- (a) . . . no action may be taken to effect or implement (1) the closure of any military installation at which at least 300 civilian personnel are authorized to be employed [or] (2) any **realignment** with respect to any [such] military installation . . . (1) involving a reduction by more than 1,000, or by more than 50 percent, in the number of civilian personnel authorized to be employed at such military installation at the time the Secretary of Defense or the Secretary of the military department concerned notifies the Congress under subsection (b) of the Secretary's plan to close or realign such installation . . . unless and until . . .
- (b) . . . the Secretary of Defense or the Secretary of the military department

concerned notifies the Committees on Armed Services of the Senate and House of Representatives, as part of an annual request for authorization of appropriations to such Committees, of the proposed closing or **realignment** and submits with the notification **[\*\*7]** an evaluation of the fiscal, local economic, budgetary, environmental, strategic, and operational consequences of such closure or **realignment** . . . .

10 U.S.C. § 2687(a), (b) (1988). **BRAC** grafts on to the requirements of Section 2687 further elaborate procedures that are effective for five years. <sup>HN2</sup>¶ Every two years from **[\*11]** 1991 to 1995 the Secretary of Defense must submit recommendations for base closures and **realignments** to the Defense Base Closure and **Realignment** Commission. After studying these recommendations, the Commission must submit its own recommendations to the President who, in turn, is to relay his approval or rejection to Congress. **BRAC** §§ 2903, 2904; see *Specter v. Garrett*, 971 F.2d 936, 940-41 (3d Cir.), vacated and remanded, 113 S. Ct. 455 (1992).

It is conceded that the **BRAC** procedures were not followed with regard to the proposed RIF. Finding that the RIF was covered by **BRAC**, the district court issued a preliminary injunction. Seneca also claimed in the district court that the RIF would violate NEPA, which requires the preparation of an environmental impact statement **[\*\*8]** "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The district court did not rule on Seneca's NEPA claim because of its disposition of the BRAC issue.

<sup>HN3</sup>¶ Although we review the district court's granting of a preliminary injunction for abuse of discretion, we review the court's conclusions of law *de novo*. *n3 Disabled Am. Veterans v. United States Dep't of Veterans Affairs*, 962 F.2d 136, 140 (2d Cir. 1992). An injunction based on an error of law qualifies automatically as an abuse of discretion. *Long Island R.R. v. International Ass'n of Machinists*, 874 F.2d 901, 906 (2d Cir. 1989), cert. denied, 493 U.S. 1042 (1990).

----- Footnotes -----

<sup>n3</sup> We hold that the issues raised in the instant matter are justiciable for the reasons stated in *Specter v. Garrett*, 995 F.2d 404 (3d Cir.), cert. granted, 114 S. Ct. 342 (1993).

----- End Footnotes----- **[\*\*9]**

The government argues that the RIF planned for SEAD is not a "**realignment**" within the meaning of Section 2687 and is therefore not covered by **BRAC**. **BRAC** § 2910(5) states: <sup>HN4</sup> ¶ "The term '**realignment**' includes any action which both reduces and relocates functions and civilian personnel positions but does not include a reduction in force resulting from workload adjustments, reduced personnel or funding levels, or skill imbalances." **BRAC** § 2910(5); see also 10 U.S.C. § 2687(e)(3).

Because SEAD's special weapons mission is not being relocated but will be eliminated altogether, the RIF, the government argues, is not a "**realignment**." Seneca contends that the term "**realignment**" includes RIFs such as that proposed for SEAD. Seneca notes that every term defined in **BRAC** § 2910, except "**realignment**," is linked to its definition by the verb "means." In contrast, "**realignment**" is defined only to "include" actions both reducing and relocating functions and civilian personnel. Because Seneca reads "includes" to mean

that actions in addition to reductions and relocations are included in the term "**realignment**," it asks us to hold that the RIF at issue is a "**realignment**." **[\*\*10]**

As its argument indicates, Seneca does not offer any parameters to its interpretation of the term "**realignment**" that inform us as to what other actions are "included." The interpretation of **BRAC** § 2910(5) urged by Seneca and adopted by the district court would bring within **BRAC's** ambit every reduction of 50% of the civilian work force at a site. If that was what Congress intended, however, the term "**realignment**" would be superfluous. Nevertheless, we need not dwell on what else "**realignment**" might mean in the context of this somewhat enigmatic statute because we believe that the natural meaning of the term "**realignment**" does not cover the outright elimination of a function. An alignment involves the positioning of one group of functions or personnel relative to another group. A **realignment** thus suggests a transfer, merger, or regrouping of functions and personnel, not an elimination of one particular function with the attendant personnel. We conclude the RIF here is an elimination of one function.

As an alternative to its argument regarding the term "includes," Seneca contends that the proposed RIF at SEAD will both reduce functions and civilian personnel positions at SEAD and relocate **[\*\*11]** them to the Sierra Army Depot at Herlong, California, another military installation with special **[\*12]** weapons capacity. However, Seneca offered only a speculative affidavit in support of this factual claim in the district court. In contrast, the government offered directives from President Bush, Secretary Cheney, and their military subordinates implementing the complete elimination of the class of weapons whose storage and maintenance formerly engaged SEAD's civilian personnel. Because Seneca has offered no probative evidence that a relocation of functions and civilian personnel will take place, the RIF cannot be considered a **realignment**.

Finally, Seneca maintains that all RIFs announced for SEAD--consolidation of industrial plant equipment functions and deactivation of the 833d Ordnance Company, as well as reduction of the special weapons personnel--must be considered cumulatively for purposes of **BRAC**. This would bring the total reduction above the threshold of a 50% decrease in civilian personnel requiring the implementation of procedures under **BRAC**. 10 U.S.C. § 2687(a)(2). However, because the special weapons RIF is not a **realignment**, **BRAC** does not **[\*\*12]** apply to it, and the civilian personnel from special weapons do not count toward the threshold level.

The district court declined to rule on Seneca's claim under NEPA because it based its injunction on **BRAC**, *County of Seneca*, 806 F. Supp. at 413, which exempts base closures and **realignments** carried out under its authority from compliance with NEPA under most circumstances. **BRAC** § 2905(c). Because we find that the proposed RIF is not a "**realignment**" subject to **BRAC**, however, NEPA might therefore apply and serve as a proper basis for a preliminary injunction. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1019 n.34 (2d Cir. 1975) (preliminary injunction may be upheld on other grounds than those relied on in district court if "other grounds would have *compelled* the issuance of one").

Seneca claims that the government violated NEPA by preparing neither an "environmental impact statement" ("EIS") nor an "environmental assessment" ("EA") in connection with the proposed RIF that, they assert, will affect the "quality of the human environment." 42 U.S.C. § 4332(2)(C). <sup>HNS</sup> Under NEPA, an EIS or EA is not **[\*\*13]** required unless the contemplated action will affect the environment "in a significant manner or to a significant extent," with significance defined in terms of both context and intensity. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 & n.20, 104 L. Ed. 2d 377, 109 S. Ct. 1851 (1989). As movant in the district court, Seneca bore the burden of showing that the RIF will significantly affect the physical environment as opposed to the economic health of the region. *Id.*; *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772, 75 L. Ed. 2d 534, 103 S. Ct. 1556 (1983) ("NEPA does not require the agency to assess every impact or effect of its proposed action, but only the impact or effect on the environment.").

Seneca failed to meet this burden because it has made no showing of threatened environmental damage as opposed to economic effects. Although Seneca cites a litany of environmental problems associated with SEAD's presence in Romulus, New York, these problems were created by past actions, ironically by the very presence of SEAD that Seneca seeks to continue. NEPA, on the other hand, relates solely to future agency actions. *Metropolitan Edison*, 460 U.S. at 779. **[\*\*14]** Moreover, ~~HN6~~ reductions of civilian personnel staffing levels are defined by the Army as a type of action categorically excluded pursuant to 40 C.F.R. § 1507.3(a), (b)(2)(ii) from NEPA's mandates so long as they (1) fall below the threshold for reportable actions, (2) will not result in the abandonment of the facility or disruption of environmental services, or (3) do not otherwise require an EIS or EA. 32 C.F.R. §§ 651.18 & 651 app. A-14 (1993). None of these conditions obtains and Seneca has not shown the Army acted arbitrarily and capriciously in applying a categorical exemption to the RIF, *Marsh*, 490 U.S. at 375-76, and in filing its Record of Consideration demonstrating the lack of environmental effect. For these reasons, Seneca has failed to show a likelihood of success **[\*13]** on the merits on its claim that the proposed RIF violates NEPA. n4

----- Footnotes -----

n4 We do not order dismissal of the complaint because the issue of whether functions and personnel will be relocated to the Sierra Army Depot at Herlong, California, is a factual issue. Seneca's evidentiary presentation was insufficient to support a preliminary injunction, but we cannot convert that proceeding, in which Seneca bore the burden, into a motion for summary judgment against it, see *Fed. R. Civ. P. 56*, on which the government would bear the burden.

----- End Footnotes----- **[\*\*15]**

We therefore confirm our prior order vacating the preliminary injunction.

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*48 F. Supp. 2d 582, \*; 1999 U.S. Dist. LEXIS 7651, \*\*;  
29 ELR 21340*

CITIZENS CONCERNED ABOUT JET NOISE, INC., a Virginia non-stock corporation, Plaintiff, v.  
JOHN H. DALTON, in his official capacity as Secretary of the Navy; and the UNITED STATES  
OF AMERICA, Defendants.

ACTION NO. 2:98cv800

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK  
DIVISION

48 F. Supp. 2d 582; 1999 U.S. Dist. LEXIS 7651; 29 ELR 21340

May 19, 1999, Decided  
May 19, 1999, Opinion Filed

**DISPOSITION:** **[\*\*1]** Defendant's cross-motion for summary judgment GRANTED and plaintiff's motions for summary judgment and a permanent injunction DENIED.

#### CASE SUMMARY

**PROCEDURAL POSTURE:** Plaintiff citizens group and defendants, the secretary of the Navy and the United States, filed cross-motions for summary judgment in plaintiff's action challenging the adequacy of the final environmental impact study produced by the Navy pursuant to the requirements of the National Environmental Policy Act, 42 U.S.C.S. §§ 4321-70d, regarding the transfer of Navy aircraft.

**OVERVIEW:** Plaintiff citizens group challenged the reasonableness and adequacy of the final environmental impact statement (FEIS) in moving for summary judgment in plaintiff's action under the National Environmental Policy Act (NEPA), 42 U.S.C.S. §§ 4321-70d. The court determined that the Navy did not act arbitrarily and capriciously by including the ultimate location in every alternative realignment scenario related to the transfer of Navy aircraft. The court found that the FEIS indicated that the Navy considered options to the disputed transfer and included cost considerations and environmental considerations. The court indicated that the Navy properly concluded that when no federal funds would be expended in private mitigation efforts, there was no need to include those costs as part of its cost-benefit analysis. Additionally, the court concluded that the FEIS adequately addressed the safety risks of the aircraft transfer. Finally, the court held that plaintiff's arguments about the air quality discussions contained in the FEIS were not relevant to the question before the court because they related to compliance with the Clean Air Act, which was not at issue in the litigation.

**OUTCOME:** Defendants' motion for summary judgment was granted and plaintiff's motions for summary judgment and a permanent injunction were denied. Plaintiff failed to prove that the final impact statement was inadequate, or that the decision-maker did not have the necessary information to make an informed decision. The court held that the Navy conducted a thorough analysis and complied with the requirements of the National Environmental Policy Act.

**CORE TERMS:** aircraft, noise, contour, air, mitigation, environmental, squadron, station, methodology, administrative record, airfield, air quality, emission, environmental impact, operational, flight, decisionmaker, summary judgment, property values, noise impact, attenuation, Base Closure Act, Clean Air Act, realignment, recommendation, closure, training, carrier, site, scenario

**LexisNexis(R) Headnotes** ♦ [Hide Headnotes](#)

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**HN1** ♦ The National Environmental Policy Act (NEPA), 42 U.S.C.S. §§ 4321-70d does not impose any substantive requirements on federal agencies. Instead, NEPA is only a procedural mechanism that serves to ensure the agency considered environmental concerns in its decision making process. [More Like This Headnote](#)

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**HN2** ♦ The National Environmental Policy Act (NEPA), 42 U.S.C.S. §§ 4321-70d process does not mandate a particular outcome, but only describes the process necessary to reach an informed decision. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. The agency is free to take the most environmentally costly course of action or alternative, so long as the environmental impact is fully identified in the environmental impact statement (EIS) and the agency determines that "other values" outweigh the impact on the environment. Moreover, the NEPA regulations clearly anticipate that an agency will have a preferred alternative, perhaps even a specific proposal, going into the EIS process. [More Like This Headnote](#)

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**HN3** ♦ An agency's decision may be based on factors including economic and technical considerations and agency statutory missions, as well as any essential considerations of national policy which were balanced by the agency. The National Environmental Policy Act, 42 U.S.C.S. §§ 4321-70d § 1505.2(b). The agency must also evaluate reasonably foreseeable significant adverse effects on the human environment, which are known as the cumulative impacts. 42 U.S.C.S. §§ 1502.22 and 1508.7. [More Like This Headnote](#)

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[Administrative Law](#) > [Judicial Review](#) > [Standards of Review](#) > [Standards Generally](#) 

**HN4** ♦ The standard for judicial review is whether the agency decision, in view of the final environmental impact study was arbitrary and capricious, an abuse of discretion, or not in accordance with the law. The focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court. [More Like This Headnote](#)

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**HN5** ♦ The National Environmental Policy Act, 42 U.S.C.S. §§ 4321-70d § 1505.2(b) does not impose a requirement that the environmental impact analysis be perfect, only that the decisionmaker has sufficient information to accurately compare the environmental effects of the various alternatives. [More Like This Headnote](#)

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**HN6** ♦ Courts have consistently held that the choice of scientific methodology used in an environmental impact study is within the sound discretion of the

agency. [More Like This Headnote](#)

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**HN7** ↓ When no federal funds will be expended in private mitigation efforts, there is no need to include those costs as part of a cost-benefit analysis. [More Like This Headnote](#)

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**HN8** ↓ The National Environmental Policy Act, 42 U.S.C.S. §§ 4321-70d, does not require an agency to discuss speculative environmental impacts. [More Like This Headnote](#)

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**HN9** ↓ Questions of methodology are within an agency's discretion. So long as the method chosen reasonably informs the decisionmaker and the public of potential environmental impacts and allows appropriate comparison between alternatives, the final environmental impact study is adequately prepared. [More Like This Headnote](#)

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**HN10** ↓ The National Environmental Policy Act (NEPA), 42 U.S.C.S. §§ 4321-70d does not impose a requirement on government agencies to comply with the provisions of the Clean Air Act. Under NEPA, an agency is only required to describe and analyze the adverse effects on the human environment. In the air quality context, as long as the final environmental impact study (FEIS) reasonably describes the change in pollutants that will result from a proposed action, and does so without any significant errors, the FEIS is adequate. Essentially, the air pollution described in a FEIS can be well in excess of Clean Air Act limits, but so long as the pollutant amounts were calculated without a significant error, NEPA is satisfied, even though the provisions of the Clean Air Act may not be. [More Like This Headnote](#)

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[Evidence](#) > [Procedural Considerations](#) > [Inferences & Presumptions](#) 

**HN11** ↓ In a suit under the National Environmental Policy Act (NEPA), 42 U.S.C.S. §§ 4321-70d, the burden is on the plaintiff not just to point out possible errors in the agency's assumptions and methodology, but to demonstrate how and why the final environmental impact statement (FEIS) was erroneous. Only after such a demonstration can the reviewing court determine whether the alleged error in the FEIS was significant enough to find that the agency acted arbitrarily or capriciously. [More Like This Headnote](#)

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**HN12** ↓ Because the National Environmental Policy Act (NEPA), 42 U.S.C.S. §§ 4321-70d requires agencies to examine the adverse environmental effects of proposed actions, there is an implicit requirement that the final environmental impact statement (FEIS) also discuss efforts to avoid those adverse effects. NEPA specifically requires agencies to examine possible mitigation measures in the FEIS. 40 C.F.R. § 1502.14(f); 42 U.S.C.S. § 1502.16(h). However, because NEPA does not require detailed explanations of possible mitigation efforts, there does not need to be a fully developed mitigation plan presented in the FEIS. In fact, because it is only procedural and not substantive in nature, NEPA does not require agencies to implement any of the mitigation measures discussed in the FEIS. [More Like This Headnote](#)

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**HN13**  The National Environmental Policy Act (NEPA), [42 U.S.C.S. §§ 4321-70d](#), does not require an environmental justice analysis, and, Exec. Order No. 12,898, [59 Fed. Reg. 7,629 \(1994\)](#), specifically states that any agency actions taken pursuant to the provisions of the Order are not subject to judicial review. [More Like This Headnote](#)

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**HN14**  See Exec. Order No. 12,898, [59 Fed. Reg. 7,629 \(1994\)](#).

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**HN15**  When designing the scope of the environmental impact study, an agency must include cumulative actions, which are those that when viewed with other proposed actions have cumulatively significant impacts. [40 C.F.R. § 1508.25\(a\)\(2\)](#). Significant cumulative impacts occur if the current action, when added to past, present, and reasonably foreseeable future actions, results in significant adverse effects on the human environment. [40 C.F.R. § 1502.22](#); [40 C.F.R. § 1508.7](#). When evaluating cumulative impacts, the agency must clearly indicate any incomplete or unavailable information that prevents a complete evaluation of the environmental impacts. [40 C.F.R. § 1502.22](#). [More Like This Headnote](#)

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**HN16**  The National Environmental Policy Act, [42 U.S.C.S. §§ 4321-70d](#), does not require agencies to examine ethereal possibilities, but only future actions that have actually been proposed. [More Like This Headnote](#)

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**HN17**  Under the National Environmental Policy Act (NEPA), [42 U.S.C.S. §§ 4321-70d](#), it is often the case that an agency will have a preferred alternative, perhaps even a specific proposal, going into the environmental impact study process. See [40 C.F.R. § 1502.2\(g\)](#); [40 C.F.R. § 1502.4\(a\)](#). In fact, it would be the unusual case for an agency not to have such a proposal, because it is often the agency's proposed action that triggers the NEPA process. In such a case, NEPA only requires that the ultimate decisionmaker remain open to reconsidering any or all aspects of the proposed action based on the environmental impact identified in the FEIS. NEPA merely prohibits uninformed, rather than unwise, agency action. [More Like This Headnote](#)

**COUNSEL:** For Plaintiff: Jack E. Ferrebee, Esquire, Denton & Ferrebee, PLC, Virginia Beach, VA.

For Defendants: Susan L. Watt, Assistant United States Attorney, Norfolk, VA.

For Defendants: Geoffrey Garver, Esquire, U.S. Department of Justice, Robert Smith, Esquire, U.S. Department of the Navy, Navy Litigation Office, Washington, DC.

**JUDGES:** Honorable Rebecca Beach Smith, United States District Judge.

**OPINIONBY:** Rebecca Beach Smith

**OPINION: [\*585] OPINION AND FINAL ORDER**

This matter is before the court on cross-motions for summary judgment. For the reasons detailed herein, the court **GRANTS** defendants' motion for summary judgment and **DENIES**

plaintiff's motion for summary judgment and permanent injunction. n1

----- Footnotes -----

n1 At the hearing on the motions for summary judgment and permanent injunction, the court also heard evidence and argument on plaintiff's motion for a preliminary injunction. The court denied the motion for preliminary injunction at the conclusion of the hearing.

----- End Footnotes----- **[\*\*2]**

Plaintiff, Citizens Concerned About Jet Noise, Inc. ("CCAJN"), seeks to halt the transfer of 156 Navy F/A-18 "Hornet" aircraft from Naval Air Station ("NAS") Cecil Field to NAS Oceana, located in Virginia Beach, by challenging the adequacy of the Final Environmental Impact Study ("FEIS") produced by the Navy pursuant to the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C.A. §§ 4321-70d. The court has federal question jurisdiction over this NEPA action under 28 U.S.C. § 1331.

**I. Factual Background**

CCAJN is a Virginia non-stock corporation comprised of Virginia Beach and Chesapeake residents who live in the vicinity of NAS Oceana and Naval Auxiliary Landing Field ("NALF") Fentress. NAS Oceana is a designated Master Jet Base located within the corporate limits of Virginia Beach. NALF Fentress is located in the city of Chesapeake and is an auxiliary airfield used by Navy aircraft to practice carrier landings prior to overseas deployments aboard aircraft carriers. n2 The **[\*586]** members of CCAJN are residents of Virginia Beach and Chesapeake who live within the accident potential zones and noise corridors surrounding NAS Oceana and NALF Fentress. Although **[\*\*3]** the corporation name specifically refers to "jet noise," the group's concerns are much broader, encompassing safety, air quality, economic and educational impacts, and property values, all of which were addressed in the challenge to the FEIS.

----- Footnotes -----

n2 NALF Fentress is used by aircraft based at NAS Oceana and NAS Norfolk.

----- End Footnotes-----

The origins of the FEIS challenged in this action date back to 1990. In that year, as part of the National Defense Authorization Act for fiscal year 1991, Congress passed the Defense Base **Realignment** and Closure Act of 1990 ("Base Closure Act"), Pub. L. No. 101-510 tit. 29, part A, §§ 2901 to 2910, 104 Stat. 1485, 1808-19, as amended (contained in 10 U.S.C. § 2687 statutory notes), which provided a mechanism for identifying and authorizing the closure of military bases. The Base Closure Act established an eight-man Base **Realignment** and Closure ("**BRAC**") Commission to spearhead the closure process. The **BRAC** Commission received the closure recommendations made by each service branch, and, after reviewing **[\*\*4]** those recommendations, made independent recommendations regarding the bases that should be closed. The **BRAC** Commission transmitted its recommendations to the President, who had only two options. The President could approve the entire **BRAC** report and send it on to Congress, or reject the report, thereby terminating the closure process for that cycle.

Once received from the President, Congress could either accept or reject the **BRAC** report in

its entirety. If Congress did not reject the **BRAC** report within forty-five days, the Base Closure Act directed the Secretary of Defense to carry out all of the closure and **realignment** decisions in the **BRAC** report. In other words, if not rejected by Congress, the **BRAC** report became binding law on the Secretary of Defense. The Base Closure Act also mandated that **realignment** and closure actions be initiated within two years of the date the **BRAC** report was sent to Congress by the President, and that all closures and **realignments** be completed within six years of that date. The Base Closure Act mandated that the entire process be repeated three times, with the Commission's recommendations due to the President in 1991, 1993, and 1995.

Under the 1993 **BRAC** **[\*\*5]** report, approved by both the President and Congress, the Secretary of Defense was directed to close the Master Jet Base at NAS Cecil Field, outside of Jacksonville, Florida, and distribute the air assets from NAS Cecil Field to other bases. The 1993 report specifically directed that the Navy transfer all of the F/A-18 aircraft at NAS Cecil Field to Marine Corps Air Station ("MCAS") Cherry Point, North Carolina. Two years later, however, in the 1995 **BRAC** report, that decision was changed. The 1995 **BRAC** report redirected the F/A-18 aircraft to "other naval air stations, primarily [NAS], Oceana, Virginia; [MCAS], Beaufort, South Carolina; [NAS] Jacksonville, Florida, and [NAS] Atlanta, Georgia; or other Navy or Marine Corps Air Stations with the necessary capacity and support infrastructure." Defense Base Closure and **Realignment** Commission, 1995 Report to the President, at 1-50. Not only was MCAS Cherry Point not even listed as a "primary" receiving site, but the 1995 **BRAC** report also did not delineate the new location of the F/A-18s, leaving that decision to be made by the Navy. The 1995 **BRAC** report became binding law after its recommendations were accepted by both the President **[\*\*6]** and Congress.

The 1995 **BRAC** Commission redirected the F/A-18s because "the accelerated retirement of the A-6E aircraft at NAS Oceana creates a vacancy in existing facilities. This redirect uses this capacity and avoids substantial new construction at MCAS Cherry Point, North Carolina." *Id.* (emphasis added). This reasoning **[\*587]** tracks with the justification offered by the Department of Defense ("DOD"), which requested the redirect in order to avoid adding to existing excess capacity. Thus, between the DOD and the BRAC Commission, it is clear that the overriding concern of the 1995 BRAC recommendation was to use the excess capacity already in existence, especially at NAS Oceana, before building new and extensive facilities at an air station without substantial excess capacity.

The 180 F/A-18s stationed at NAS Cecil Field are assigned to eleven fleet squadrons (twelve aircraft per squadron) and one Fleet Replacement Squadron ("FRS") (forty-eight aircraft squadron). The FRS trains new pilots in the F/A-18 aircraft before the pilots are assigned to fleet squadrons. The fleet squadrons deploy aboard aircraft carriers homeported in Norfolk, Virginia, and Mayport, Florida. These carriers **[\*\*7]** deploy in the Atlantic Ocean and Mediterranean Sea for six-month periods. Prior to these extended deployments, the carriers and their complements of aircraft conduct training in operational areas off the Atlantic seaboard. In addition, when not deployed aboard the carriers, the F/A-18 squadrons are required to maintain a rigorous training schedule that requires training areas for air-to-air and air-to-ground operations, as well as airfields for practicing carrier landings prior to deployments. The aircraft also have periodic maintenance requirements that cannot be met by the squadron maintenance personnel, but, instead, must occur at an Aviation Intermediate Maintenance Depot ("AIMD").

With these operational considerations in mind, the Navy developed screening criteria designed to satisfy the 1995 BRAC mandate that the F/A-18s be transferred to stations with the "necessary capacity and infrastructure." FEIS at 2.1-1. The capacity analysis paralleled the methodology of the BRAC process by focusing on available aircraft hangar modules as the main indicator of excess capacity at a particular airfield. *Id.* at 2.1-2. The Navy's infrastructure analysis evaluated the runway capacity **[\*\*8]** (number and length), as well as maintenance, training, and other support infrastructure at each base. *Id.* at 2.2-1 to 2.1-6.

Finally, the operational analysis accounted for the myriad of F/A-18 training requirements, including access to training ranges within 100 miles of the receiving installation, airspace availability, access to auxiliary fields within fifty miles of the receiving installation for Field Carrier Landing Practice ("FCLP"), and other combat readiness criteria. Id. at 2.2-7 to 2.2-10.

After applying these screening criteria to twenty eastern seaboard Navy and Marine Corps Air Stations, the Navy determined that only three, NAS Oceana, MCAS Cherry Point, and MCAS Beaufort, had sufficient excess capacity and the necessary infrastructure to support F/A-18s. Id. at 2.1-12. Following a total of seven public "scoping" meetings, the Draft Environmental Impact Statement ("DEIS") was distributed on September 19, 1997.

The draft identified five Alternative Realignment Scenarios ("ARSs") that were under consideration. ARS 1, the only single-site alternative developed, placed all of the aircraft at NAS Oceana. ARS 2 maximized use of existing capacity at two air stations **[\*\*9]** by placing nine squadrons and the FRS at NAS Oceana and two squadrons at MCAS Beaufort. ARS 3 also maximized use of existing capacity at two air stations by placing eight squadrons and the FRS at NAS Oceana and three squadrons at MCAS Cherry Point. ARS 4 placed five squadrons at MCAS Beaufort, requiring an expansion in capacity, and six squadrons plus the FRS at NAS Oceana, which utilized all the capacity there. ARS 5 placed five squadrons at MCAS Cherry Point, also requiring an expansion in capacity, and six squadrons and the FRS to NAS Oceana, again using all existing capacity. ARS 5 was identified in the Record of Decision ("ROD") as the "environmentally preferred alternative."

**[\*588]** Seven public hearings were held on the DEIS and public comment was accepted through December 2, 1997. In light of the comments received, the Navy made a number of changes to the DEIS and made the FEIS available for public comment on March 20, 1998. The FEIS identified ARS 1 as the Navy's preferred alternative, primarily for operational reasons related to the Navy's national defense mission. The comment period was held open for thirty days, until April 20, 1998. On May 18, 1998, the ROD selected ARS 2, which **[\*\*10]** sent nine squadrons and the FRS to NAS Oceana, and two squadrons to MCAS Beaufort.

In accordance with the Base Closure Act, preparations to close NAS Cecil Field had already begun by the time the 1995 BRAC report changed the receiving site for the F/A-18s from MCAS Cherry Point to a new location selected by the Navy. Because NAS Cecil Field was first selected for closure in the 1993 BRAC report, the six-year deadline expires at the end of fiscal year 1999, and most, if not all, funding for the base ceases after that time. Preparations to close NAS Cecil Field continued during the Navy's selection process of a new receiving site for the F/A-18s. Because the F/A-18 relocation must be completed less than two years after the ROD was issued, the Navy moved quickly to implement the decision. In fact, in their briefs before the court, both parties agree that the first contract for new construction at NAS Oceana was awarded on the same day the ROD was signed, with two more contracts following soon thereafter. On December 4, 1998, the first two squadrons of aircraft flew into NAS Oceana. The remaining squadrons are scheduled to move to NAS Oceana during 1999, either directly or upon return **[\*\*11]** from a six-month fleet deployment. n3

----- Footnotes -----

n3 A number of squadrons will not be arriving at NAS Oceana until the year 2000, but these are squadrons that are returning from deployments begun in 1999. The fact remains that essentially all F/A-18 aircraft will have left NAS Cecil Field by the end of 1999.

----- End Footnotes-----

Plaintiff filed this lawsuit on July 15, 1998, requesting permanent injunctive relief. On November 24, 1998, plaintiff filed a motion with the court for a preliminary injunction and also for summary judgment. In response, defendants also moved for summary judgment, and, following full briefing on the issues, a hearing was held before the court on January 13, 1999.

## II. The NEPA Framework and Standard of Review

**HN1** NEPA does not impose any substantive requirements on federal agencies. Instead, NEPA is only a procedural mechanism that serves to ensure the agency "considered environmental concerns in its decision making process." Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 97, 76 L. Ed. 2d 437, 103 S. **[\*\*12]** Ct. 2246 (1983). NEPA does this by requiring preparation of an environmental impact statement ("EIS") for any major federal action that significantly affects the quality of the "human environment." 42 U.S.C. § 4332(2)(c). The "heart" of the EIS is the alternatives analysis, which "should present the environmental impacts of the proposal and the alternatives in comparative form." 40 C.F.R. § 1502.14. The regulations require the agency to "evaluate all reasonable alternatives" and discuss the reasons for the elimination of alternatives from the study, *id.* at § 1502.14(a), as well as mitigation efforts related to each alternative. *Id.* at § 1502.14 (f). The agency is then required to describe the affected environment in sufficient detail "to understand the effects of the alternatives." *Id.* at § 1502.15. Finally, 40 C.F.R. § 1502.16 requires the agency to conduct a detailed examination of the environmental consequences on the affected environment, including direct and indirect effects and their significance, the environmental effects of the alternatives, and mitigation measures to the extent they were not covered under the alternatives analysis.

Significantly, the Supreme **[\*\*13]** Court has held that **HN2** the NEPA process does not **[\*589]** mandate a particular outcome, but only describes the process necessary to reach an informed decision. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350-51, 104 L. Ed. 2d 351, 109 S. Ct. 1835 (1989). In fact, "if the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id.* at 350. In other words, the agency is free to take the most environmentally costly course of action or alternative, so long as the environmental impact is fully identified in the EIS and the agency determines that "other values" outweigh the impact on the environment. Moreover, the NEPA regulations clearly anticipate that an agency will have a preferred alternative, perhaps even a specific proposal, going into the EIS process. See 40 C.F.R. § 1502.2(g) (stating that an EIS "serve[s] as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made") (emphasis added); *id.* at § 1502.4(a) ("Proposals or parts of proposals which are related **[\*\*14]** to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.").

**HN3** An agency's decision may be based on "factors including economic and technical considerations and agency statutory missions," as well as "any essential considerations of national policy which were balanced by the agency." *Id.* at § 1505.2(b). The agency must also evaluate "reasonably foreseeable significant adverse effects on the human environment," which are known as the cumulative impacts. *Id.* at §§ 1502.22 and 1508.7 (latter section defining cumulative impact as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions").

**HN4** The standard for judicial review is whether the agency decision, in view of the FEIS, was arbitrary and capricious, an abuse of discretion, or not in accordance with the law.

Fayetteville Area Chamber of Commerce v. Volpe, 515 F.2d 1021, 1024 (4th Cir. 1975). The Fourth Circuit has also emphasized the Supreme Court's admonition that "the focal point **[\*\*15]** for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Camp v. Pitts, 411 U.S. 138, 142, 36 L. Ed. 2d 106, 93 S. Ct. 1241 (1973) (quoted in Fayetteville Area Chamber of Commerce, 515 F.2d at 1024).

### III. Discussion

In support of its motion for summary judgment, plaintiff makes numerous arguments challenging the reasonableness and adequacy of the FEIS: (1) the alternatives analysis was inadequate because it did not consider other reasonable alternatives; (2) the noise analysis was not adequate because it did not fully assess the costs to the community from the higher noise levels associated with the F/A-18s; (3) the cost-benefit analysis also failed to account for costs to the community of private and public noise mitigation efforts that would be required under the analyzed ARSs; (4) the safety risk was not analyzed; (5) there were errors and omissions in the air quality analysis; (6) the FEIS failed to address practical mitigation measures with the potential to reduce the otherwise unavoidable adverse impact of jet noise at NAS Oceana; (7) the FEIS contained a flawed environmental **[\*\*16]** justice analysis; and (8) the FEIS failed to address foreseeable adverse environmental impacts as required by NEPA by not addressing the cumulative impact of the future replacement of F-14 and F/A-18 C/D aircraft with the F/A-18 E/F. Finally, plaintiff also makes a general attack on the Navy's NEPA process, arguing that the Navy deliberately deceived the public through feigned compliance with NEPA's requirements.

**[\*590]** From the briefs, case law, and an examination of the lengthy administrative record, however, the court finds that there is no basis in fact or law for plaintiff's arguments.

#### A. The Navy's Interpretation of 1995 BRAC Commission Report

An important threshold question to be answered in this case concerns the Navy's interpretation of the 1995 BRAC law. The Navy rightly viewed the 1995 BRAC report as restricting the alternatives to be considered under the EIS. For example, the Navy obviously could not choose as an alternative the option of single-siting all F/A-18s at MCAS Cherry Point, which was the 1993 BRAC recommendation explicitly rejected by the 1995 BRAC report.

In developing the screening criteria used to winnow the field of potential recipient air stations, **[\*\*17]** the Navy based those criteria on the 1995 BRAC recommendations, as well as important operational considerations, such as F/A-18 training and maintenance requirements. Significantly, although plaintiff challenges the Navy's use of NAS Oceana in every ARS, plaintiff does not challenge the selection criteria used by the Navy to winnow the list of twenty air stations down to three. In fact, at oral argument, plaintiff conceded that the Navy's use of these criteria was reasonable. In addition, the administrative record is clear that the screening criteria were developed in a reasonable manner, taking into account important operational and safety criteria related to military aircraft operations. Administrative Record ("AR") 29572-77. The court finds that the Navy's development of screening criteria was a reasonable interpretation of the 1995 **BRAC** report. The Navy also viewed the 1995 **BRAC** report as requiring the Navy to fully utilize the excess capacity at NAS Oceana, making it both reasonable and necessary to include NAS Oceana as part of every alternative. The 1995 **BRAC** recommendations specifically mention twice the excess capacity at NAS Oceana and lists NAS Oceana at the top of the list **[\*\*18]** of air stations with the "necessary capacity and support infrastructure," to handle the transfer of aircraft from NAS Cecil Field. Defense Base Closure and **Realignment** Commission, 1995 Report to the President, at 1-50. Furthermore, it is undisputed that NAS Oceana had significantly more excess capacity available than MCAS Beaufort and MCAS Cherry Point combined. NAS Oceana had sufficient

excess hangar capacity to accommodate eight fleet squadrons, FEIS at 2.2-15, while MCAS Beaufort and MCAS Cherry Point together could only accommodate five fleet squadrons. FEIS at 2.2-19; *id.* at 2.2-26. Accordingly, the Navy's interpretation of the 1995 **BRAC** report was reasonable and the Navy did not act arbitrarily and capriciously by including NAS Oceana in every ARS.

## B. Adequacy of the FEIS

### 1. Alternatives Analysis

Plaintiff first claims that the FEIS is fatally flawed because the Navy did not conduct a searching inquiry into alternatives as required by NEPA. See National Resources Def. Council v. United States Dep't of the Navy, 857 F. Supp. 734 (C.D. Cal. 1994). Plaintiff challenges the alternatives analysis on a number of specific grounds. Initially, plaintiff faults the **[\*\*19]** Navy for considering NAS Oceana as the only single-site option. Plaintiff claims that the Navy was unreasonable in its decision not to examine single-siting the aircraft at either MCAS Beaufort or MCAS Cherry Point. Plaintiff also argues that none of the scenarios contemplated placing less than fifty percent of the aircraft at NAS Oceana.

Contrary to plaintiff's assertion, the FEIS makes it quite clear that these options were considered by the Navy. However, the FEIS also indicates that these alternatives were eliminated from detailed analysis because of either the mandates contained in the 1995 BRAC report, or the Navy's operational requirements. See **[\*591]** FEIS at 2.6-1 to 2.6-8 (describing alternatives considered but rejected for detailed analysis and discussing the reasons for elimination).

With regard to single-siting at locations other than NAS Oceana, as the Navy correctly points out, single-siting the F/A-18s at MCAS Cherry Point was foreclosed by the BRAC process. This single-site option was the specific recommendation of the 1993 BRAC report, despite the fact that the relocation would involve significant construction at MCAS Cherry Point due to the lack of excess capacity **[\*\*20]** there. Two years later, though, the 1995 BRAC report specifically disavowed the MCAS Cherry Point single-site option precisely because of the excess capacity issue. Thus, as concluded above, the Navy's decision not to consider this alternative for detailed analysis was not only reasonable, but was also virtually mandated by law.

Likewise, the Navy's decision not to consider any form of single-sitting all the F/A-18s at MCAS Beaufort was also based on a reasonable interpretation of the 1995 BRAC report. The 1995 BRAC report specifically mentioned the significant excess capacity available at NAS Oceana due to the accelerated retirement of A-6s previously based there. The report further emphasized the importance of NAS Oceana as a result of this excess capacity by listing it first in the list of illustrative alternatives for receiving the F/A-18s. The Navy argues that single-siting the F/A-18s at MCAS Beaufort would leave all of the excess capacity at NAS Oceana unused. As noted earlier, it is undisputed that NAS Oceana has far more excess capacity than MCAS Beaufort and MCAS Cherry Point combined, much less MCAS Beaufort alone. Given these facts, in addition to the fact that the court **[\*\*21]** has already found the Navy's interpretation of the 1995 BRAC report to be reasonable, the court finds that the Navy's decision to consider only NAS Oceana as a single-site alternative was not arbitrary and capricious.

In fact, the Navy's reasonable interpretation of the 1995 BRAC report also supports the decision to include NAS Oceana as part of every ARS developed. By far the overriding criteria in using NAS Oceana under every ARS was the fact that it had the most excess capacity and support infrastructure of the three air stations that survived the screening process, which process is not challenged by plaintiff.

Plaintiff next argues that the Navy erred by not considering any alternatives that placed less than fifty percent of the aircraft at NAS Oceana. Again, however, given the amount of excess capacity present at NAS Oceana, the Navy's alternative analysis was consistent with the 1995 BRAC report, and, therefore, reasonable. n4 The Navy, contrary to plaintiff's assertions, also considered dividing the aircraft between the three bases. This alternative was rejected for detailed analysis because, although utilizing excess capacity at all three bases, it resulted in prohibitively **[\*\*22]** high costs. AR 29578; FEIS at 2.6-3 to 2.6-6. The triple-basing alternative would have required separate maintenance and training facilities at all three bases, resulting in significant one-time costs. FEIS at 2.6-5. In addition, there were also problems related to operational readiness because the East Coast F/A-18 community would be widely dispersed, resulting in a loss of the synergy that occurs when all the squadrons in a particular community are located together, as the F/A-18s were at NAS Cecil Field. FEIS at 2.6-6. For similar training and operational reasons, the Navy also decided that no alternative **[\*592]** should be pursued that resulted in the separation of the Fleet Replacement Squadron ("FRS") from the majority of the active duty squadrons. FEIS at 2.6-6 to 2.6-8. The findings in the FEIS are amply supported by the administrative record, which indicates that the Navy reviewed three separate triple-siting possibilities with one-time costs ranging from \$ 101 million to \$ 233 million. n5 AR 29588-96. Moreover, the administrative record also reveals that no Navy tactical jet aircraft has ever been based at three separate locations, with the attendant tripling of support personnel **[\*\*23]** and equipment costs, maintenance costs, and operational complexities. AR 29598-602. The Navy was reasonable in not considering the triple-siting alternative in the FEIS.

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n4 Plaintiff attempts to find fault with the Navy's analysis by arguing that under every ARS developed by the Navy, excess capacity at either MCAS Beaufort or MCAS Cherry Point is unused. This argument, however, is completely inconsistent with the alternatives proposed by plaintiff which either do not use all of the excess capacity at one or more bases (single-siting at MCAS Beaufort or MCAS Cherry Point, or the "NAS Beaufort" alternative), or leave a more substantial amount of excess capacity than under the ARSs proposed by the Navy (siting less than fifty percent at NAS Oceana).

n5 These estimates were the costs required over and above the costs of the "baseline scenario," which placed all the F/A-18 aircraft at NAS Oceana.

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Plaintiff also claims that the Navy erred in its development of alternatives by relying exclusively on cost **[\*\*24]** considerations and not accounting for environmental considerations. In this regard, plaintiff first claims that the Navy failed to consider other "reasonable" alternatives that complied with the BRAC mandates while also having a less adverse effect on the environment than any of the ARSs developed by the Navy. In particular, plaintiff claims that the Navy should have considered consolidating the Marine Corps aircraft from MCAS Beaufort to MCAS Cherry Point, and then moving the F/A-18s to what would then be called "NAS Beaufort." Plaintiff claims that this plan also utilizes all of the excess capacity at two of the three air stations, while also substantially reducing the environmental impact in the areas around NAS Oceana and NALF Fentress, where more people are affected by higher noise levels than around the other two bases.

As the administrative record reveals, this alternative was also considered during the preparation of the EIS. AR 29735; AR 24196. After the publication of the DEIS, plaintiff questioned the Navy about the possibility of this "NAS Beaufort" alternative. As the FEIS

reveals, the Navy rejected this alternative because the BRAC process did not give the Navy the authority **[\*\*25]** to create capacity by shifting assets between bases. FEIS at 2.6-8. The Base Closure Act limits the applicability of NEPA to actions taken as part of the BRAC process. In particular, the Base Closure Act states that when applying NEPA as part of the BRAC process, the Navy does not have to consider "military installations alternative to those recommended or selected." Base Closure Act, § 2905(c)(2)(B)(iii). The Navy relies on this section for its rejection of the "NAS Beaufort" alternative. Under the Navy's interpretation, the complex rearrangement of aircraft assets between bases, along with the redesignation of bases, was the exclusive purview of the 1995 BRAC commission. The Navy's mandate under the 1995 BRAC report with respect to the F/A-18s was to identify a receiving base for the relocation, and did not contemplate moving Marine Corps aircraft from one base to another in an effort to create capacity to receive the F/A-18s. Adding increased weight to this argument is the very specific language in the 1995 BRAC report discussing the excess capacity available at NAS Oceana. Implementation of the "NAS Beaufort" alternative would leave the excess capacity at NAS Oceana unutilized. **[\*\*26]** Accordingly, the court finds that the failure to fully analyze the "NAS Beaufort" alternative proposed by plaintiff was not arbitrary and capricious, but, instead, was based on reasonable interpretations of the Base Closure Act and the 1995 BRAC report.

Finally, plaintiff claims that the Navy did not consider environmental factors as it developed the ARSs. Plaintiff, however, does not direct the court to any statutory, regulatory, or case law authority that requires an agency to take environmental factors into account in the development **[\*593]** of alternatives. The Navy correctly points out that to require detailed consideration of environmental factors during development of alternatives would lead to a reductio ad absurdum. Essentially, plaintiff's argument would require the Navy to complete a separate EIS in order to determine the alternatives to be included in the actual EIS. The NEPA process is not designed to ensure that the most environmentally friendly alternatives are presented to the decisionmaker. Instead, when correctly done, NEPA presents the environmental impact of the chosen alternatives to the decisionmaker so that he may be properly informed of the environmental consequences **[\*\*27]** of his action. 40 C.F.R. § 1502.14.

Plaintiff claims that because environmental impact was one of the selection criteria for the BRAC process, the Navy was also required to use it in selecting alternatives. This argument fails to account for the fact that the **BRAC** Commission was not subject to the provisions of NEPA in selecting facilities to receive relocating functions or assets. Base Closure Act, § 2905 (c)(1). Moreover, environmental impact was only one of eight criteria that the Commission could use in selecting installations to close or to receive relocated functions. Memorandum in Reply to Defendants' Brief in Opposition to Motion for Preliminary Injunction and in Answer to Motion for Summary Judgment, Exhibit 8, at 1. n6 Therefore, to the extent that the Navy's selection of alternatives is analogous to the Commission's responsibility to select installations to receive assets, the Navy is entitled to use operational, nonenvironmental criteria in selecting the receiving site for the F/A-18s.

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n6 Exhibit 8 is a portion of the Executive Summary of the Defense Base Closure and **Realignment** Commission 1995 Report to the President.

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The more important point to be made in this regard, however, is the role of the Navy in selecting alternatives and the role of the **BRAC** Commission are not analogous. Environmental impact was included as a selection criteria for the Commission precisely

because its selection decisions with regard to closure and **realignment** were not subject to NEPA. The same is not true of the Navy, even when, in this case, it is basically carrying out a function delegated by the Commission. The key difference is that the Navy's selection of alternatives is ultimately subject to the exhaustive requirements of NEPA. Thus, it is not important that the Navy used only operational criteria in arriving at the alternative scenarios. Instead, the important fact is that, once developed, the alternatives were subjected to an environmental impact analysis whose comparative results were used to ensure that the decisionmaker was properly informed as to the results of his decision.

## 2. Noise Analysis

Plaintiff expends a great deal of effort in disputing the noise analysis contained in the FEIS. Plaintiff describes the adverse noise effects in great statistical detail. To list some examples, plaintiff describes **[\*\*29]** the large increase in flight operations, both day and night, near NAS Oceana and NALF Fentress from 1997 to 1999 as a result of the relocation; the significant increases in the number of residents in high noise zones; the increase in the number of public schools located in high noise zones; the huge increases, in some cases as much as 300%, in average perceived sound loudness in the twenty-two public schools located within the high noise zones; and the specific and detailed increase in decibel ("dB") level at each school in the high noise zones. The problem with this approach is that every single number cited by plaintiff comes directly from the FEIS. Thus, it is clear that the FEIS more than adequately informed the decisionmaker of the significant adverse noise consequences for the human environment resulting from the relocation of F/A-18s to NAS Oceana. Plaintiff's noise arguments basically constitute a dispute over **[\*594]** non-material matters, Dubois v. Department of Agric., 102 F.3d 1273, 1287 (1st Cir. 1996) (stating that agency action should not be disturbed based on "inconsequential or technical deficiencies"), or matters best left to agency discretion. See Valley Citizens For a Safe Env't v. Aldridge, 886 F.2d 458, 469 (1st Cir. 1989) (Breyer, J.) (stating that it is within the agency's discretion "to determine proper testing methods").

The FEIS analyzes noise effects in considerable detail. For each of the three air stations examined in the ARSs, the Navy developed noise contours based on projected air operations at each field following the relocation. The Navy then compared these contours with historical noise contours at each field. For instance, for NAS Oceana, the Navy compared the post-relocation contour ("the 1999 noise contour") with a noise contour developed from known air operations at the field in 1997. The Navy also compared the 1999 noise contours with the contours contained in the 1978 Air Installation Compatible Use Zone ("AICUZ"), which was developed as part of a program established in the 1970s to address community noise and safety impacts. n7 By comparing each of these sets of contours around NAS Oceana, the Navy determined the increase in population living within the new, 1999 noise contours compared to the older noise contours. n8

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n7 The AICUZ contours for each air station were developed in different years, but the Navy conducted a proper comparative analysis despite this disparity because the Navy also developed 1997 contours for each station. The comparison of the 1999 noise contours with the 1997 contours provided a consistent basis of comparison between the three air stations. The Navy's comparison of the 1997 contours and the older AICUZ contours at each station was provided merely to demonstrate the historical change in operations at each air station. **[\*\*31]**

n8 For NAS Oceana and NALF Fentress under ARS 2, the Navy determined that there would

be 45,852 more people within Noise Zone Two (65 to 75 dB) in 1999 than in 1997, but only 18,486 more people than in 1978. For Noise Zone Three (75 dB or greater), there would be 46,781 more people exposed to that level of sound in 1999 than in 1997, but, again, only 14,668 more people than in 1978. The greater difference between 1999 and 1997 compared to 1999 and 1978 is attributable to a substantial decrease in flight operations between 1978 and 1997 as a result of the retirement of the A-6 aircraft that were based at NAS Oceana until 1996.

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According to plaintiff, the Navy's noise analysis erred in two respects, resulting in an understatement in the FEIS of the number of people affected by the increase in area covered by Noise Zone Two (65 to 75 dB Ldn n9) and Noise Zone Three (75 dB Ldn or greater). Plaintiff first faults the Navy for using 1990 census data in its noise study when more accurate 1996 population data was available for the City of Virginia Beach. Plaintiff also claims that the noise contours **\*\*\*32** themselves are erroneous because they fail to consider deviations from flight patterns and do not count certain types of aircraft operations, such as air show practices, helicopter operations and transient aircraft operations.

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n9 Ldn is the day-night average sound intensity averaged over a twenty-four hour period. As even plaintiff acknowledges, Ldn "is used to define sound level contour, i.e. Noise Zones." Plaintiff's Opening Brief at 17 n.9.

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As the Navy correctly points out, although the administrative record indicates that 1996 population data was available for Virginia Beach and Chesapeake, there is no indication that comparable figures were available for the geographic areas around MCAS Beaufort and MCAS Cherry Point. Without such information, the Navy could not reasonably carry out an accurate comparison between the noise effects on the three sites as NEPA requires. In addition, by not providing any estimates of the comparable population figures for 1996 around MCAS Beaufort and MCAS Cherry Point, plaintiff **\*\*\*33** is unable to point to any environmental significance accruing to the Navy's failure to use available 1996 population figures for Virginia Beach. Moreover, use of the 1996 Virginia Beach and **\*\*\*595** Chesapeake population numbers, without comparable data for the areas surrounding the other two air stations, exaggerates the already large difference in affected population between areas around NAS Oceana/NALF Fentress and MCAS Beaufort or MCAS Cherry Point. The court finds that the Navy's consistent use of 1990 census figures in the FEIS was reasonable, and accurately represented the scope and magnitude of the difference in noise effects on the areas surrounding each air station. See Citizens Comm. Against Interstate Route 675 v. Lewis, 542 F. Supp. 496, 554-55 (S.D. Ohio 1982) (holding that it is reasonable to use old population data, even when more recent numbers are available, absent some showing of environmental significance of failure to use more recent data); Minnesota Pub. Interest Research Group v. Adams, 482 F. Supp. 170, 176 (D. Minn. 1979) (same).

Likewise, the court finds that plaintiff's arguments regarding the size of the 1999 noise contours are unfounded. Plaintiff argues **\*\*\*34** that the aircraft landing patterns used in the noise contour analysis are too difficult to be flown by pilots flying in and out of NAS Oceana, resulting in substantial deviations from flight path centerlines and an expansion in the actual sound contours. However, this argument is belied by plaintiff's own evidence. At the January 13, 1999, hearing on the preliminary injunction, plaintiff offered the testimony of

one of its members, Herbert A. Stokely, a retired Navy pilot who had flown in and out of NAS Oceana while on active duty at NAS Norfolk. Stokely testified on direct examination that "aircraft can indeed fly the patterns at [NAS] Oceana." Stokely also testified that an aircraft could "easily" stay within the flight patterns that were used in the noise analysis and for the development of Accident Potential Zones ("APZs"). Stokely also admitted that a possible reason for the difference in the size of the patterns flown at NAS Oceana and NALF Fentress is the fact that there are typically more aircraft in the landing pattern at Fentress than at Oceana, because of the Field Carrier Landing Practice ("FCLP") that occurs at NALF Fentress.

The FEIS also addressed plaintiff's contention **[\*\*35]** directly. The FEIS recognizes the aircraft will not always fly on the centerline used to conduct the noise analysis. Instead, "actual patterns may vary due to type of aircraft, aircraft weight, aircrew technique, number of aircraft in the pattern, wind, etc." FEIS at 3.1-1. Moreover, unlike plaintiff's argument, the FEIS does not limit these reasons to differences that will occur only at NAS Oceana. Instead, because these are variables that occur at every airfield, it is clear to the court that, to the extent there will be some minor differences in the actual noise contours compared to the model contours, the differences will also occur at MCAS Beaufort and MCAS Cherry Point. n10 In this regard, plaintiff's repeated emphasis on the adverse environmental effects at NAS Oceana is misplaced. The important point for determining whether the FEIS was arbitrary and capricious is that the same methodology was used at each airfield, allowing the same variables to occur at each location. <sup>HNS</sup>NEPA does not impose a requirement that the environmental impact analysis be perfect, only that the decisionmaker has sufficient information to accurately compare the environmental effects of the various alternatives.

**[\*\*36]** Dubois, 102 F.3d at 1287. Here, by using the same methodology to arrive at the noise contours at each air station, and recognizing that there are uncontrollable variables that will not allow the actual contours to mirror the ideal, the FEIS properly represented the relative impact of increased noise on the populations surrounding the three air **[\*596]** stations. n11

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n10 The testimony of Mr. Stokely did not take these variables into consideration. Instead, his testimony concerned the feasibility of flying the centerline pattern in the absence of these variables.

n11 Plaintiff's argument that the noise contours are not accurate because the FEIS fails to account for certain irregularly staged events, such as air show practices and transient aircraft operations, fails for much the same reason. These irregular, hard to track operations were not included in the analysis at any of the air stations. Moreover, as the Navy correctly points out, it is unclear that they occur with sufficient frequency as to cause a significant impact on the noise analysis.

----- End Footnotes----- **[\*\*37]**

Plaintiff next claims that the noise analysis methodology employed in the FEIS did not accurately portray the noise effects on the areas surrounding the air stations. Specifically, plaintiff questions the Navy's heavy reliance on the day-night average sound level metric (Ldn). Plaintiff claims that the use of Ldn does not accurately portray the noise impact on the population and sensitive noise areas, such as public schools and churches. According to plaintiff, using averages, such as Ldn and Leq, n12 does not account for the noise impact resulting from single noise events. Instead, plaintiff claims that the FEIS analysis should have focused more on the noise impact of single noise events by using the Sound Exposure Level ("SEL") metric. Plaintiff also faults the FEIS for failing to discuss the impact of sound levels

associated with single noise events on education and learning in the schools located near NAS Oceana and NALF Fentress, as well as the disruption of sleep patterns.

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n12 Leq is the equivalent noise level metric for a portion of the twenty-four hour period measured by the Ldn noise metric. As used in the FEIS, Leq measured the average sound level during the school day from 7:00 a.m. to 4:00 p.m. FEIS at 4.8-4. Use of Leq presented a more accurate picture of the sound levels experienced in public schools because the 10 dB penalty for nighttime flights was then not considered.

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**[\*\*38]** *HN6*

Courts have consistently held that the choice of scientific methodology used in an EIS is within the sound discretion of the agency. Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 578 (9th Cir. 1998); Communities, Inc. v. Busey, 956 F.2d 619, 623 (6th Cir. 1992); Sierra Club v. United States Dep't of Trans., 243 U.S. App. D.C. 302, 753 F.2d 120, 128 (D.C. Cir. 1985). More precisely, numerous courts have approved the use of the exact sound methodology used in this case, while rejecting the exact argument that plaintiff makes here. Morongo Band of Mission Indians, 161 F.3d at 578 (approving use of Ldn methodology and rejecting argument that FAA was required to consider single-event noise levels); Communities, Inc., 956 F.2d at 623 (holding that there was no requirement for FAA to go beyond the Ldn cumulative noise impact methodology); Valley Citizens, 886 F.2d at 468-69 (acknowledging that the cumulative impact methodology is the standard methodology used by all federal agencies, mainly because there is no other viable methodology that yields as complete a picture of the overall noise impacts); Sierra Club v. United States Dep't of Trans., 753 F.2d **[\*\*39]** at 128 (rejecting argument that failure to use single event noise analysis instead of, or in addition to, cumulative noise methodology was unreasonable). Therefore, plaintiff has failed to demonstrate that the Navy's "decision to rely on average noise levels, rather than single-event noise impacts, was arbitrary or capricious." Morongo Band of Mission Indians, 161 F.3d at 579.

### 3. Cost-Benefit Analysis

Plaintiff claims that any cost-benefit analysis based on the information contained in the FEIS was erroneous because the FEIS, while it projected enormous economic benefits to the communities surrounding NAS Oceana and NALF Fentress, failed to disclose significant costs to the community. Specifically, plaintiff claims the Navy knew that residential and school attenuation costs were upwards of \$ 1.6 billion, but refused to disclose this fact in the FEIS. Plaintiff also claims that the Navy failed to adequately disclose and discuss the adverse economic impact of aircraft noise on property values.

**[\*597]** With respect to the question of attenuation costs, the Navy raises a two-fold argument. First, the Navy argues that because it does not have authority to expend federal funds on **[\*\*40]** private and local government mitigation projects, there is no requirement to discuss those costs in the FEIS. The Navy correctly points out that plaintiff supports its argument with an improper analogy to the FAA. The FAA has received authority from Congress to expend federal funds on noise mitigation at private residences and sensitive noise receptors as part of the FAA's consideration of airport construction or expansion projects. Unlike the FAA, the Navy has no such authority. Thus, the Navy properly concluded that *HN7* when no federal funds would be expended in private mitigation efforts, there was no need to include those costs as part of its cost-benefit analysis. See Methow Valley Citizens

Council, 490 U.S. at 352-53 (holding agency did not have to submit fully developed mitigation plan or receive assurance that mitigation would occur before proceeding with proposed action where mitigation measures were completely within jurisdiction of state and local governments). That said, however, the Navy did not completely ignore the consequences of the transfer of the F/A-18s on the local community.

The FEIS explicitly acknowledges that the transfer will have a significant noise impact **[\*\*41]** on the surrounding community. FEIS at 4.8-1. The FEIS also thoroughly examined the noise impact on sensitive noise receptors such as public schools. FEIS at 4.8-4 to 4.8-9. The Navy even used the FEIS to suggest a number of methods that the local community could mitigate the noise impact, and also indicated its plan to work with local community officials to conduct surveys of the noise impacts at local schools. FEIS at 4.8-4.

Second, the Navy argues that the FEIS properly excluded consideration of mitigation costs to private homeowners because such costs were too speculative. The Navy claims the costs were speculative because there was no way of determining how many homeowners would actually undertake mitigation. n13 It is also uncertain whether all of the homes in question would even require additional sound attenuation. n14 The cases the government relies on **[\*598]** to support this argument, though, simply state that <sup>HNS</sup>NEPA does not require an agency to discuss speculative environmental impacts. See, e.g., Dubois, 102 F.3d at 1286; Environmental Def. Fund, Inc. v. Hoffman, 566 F.2d 1060, 1067 (8th Cir. 1977). Here, the noise impact is not speculative, but is, in fact, quite well known. **[\*\*42]** At the same time, the Navy's reading of these cases for the broader proposition that NEPA does not require discussion of speculative mitigation costs resulting from the known noise impact appears to be correct, given the insurmountable difficulty of calculating those costs, n15 Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 290 (4th Cir. 1999) ("the mere fact that certain factors in a cost-benefit analysis are generally imprecise or unquantifiable does not render the result inadequate"), and the fact that there is no requirement that a complete mitigation plan be developed when the means and authority to mitigate are outside the agency's purview. Methow Valley Citizens Council, 490 U.S. at 352-53. As a result, the court finds that the Navy did not act arbitrarily or capriciously in failing to discuss the costs of private and local government sound attenuation.

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n13 Plaintiff relies heavily on the fact that the Chief of Naval Operations ("CNO") was given an analysis that indicated the sound attenuation costs for the approximately 33,948 single-family homes experiencing noise impacts greater than 65 dB would average \$ 30,000 per residence. AR 50501. The analysis also indicated that school attenuation costs would average \$ 1.5 million per school. Id. However, plaintiff's use of these numbers is taken out of context. The memorandum prepared for the CNO was a comparison of Navy and FAA policies on noise mitigation. The memorandum clearly states the same Navy policy discussed in the FEIS, namely that the Navy, while encouraging attenuation efforts by local communities, does not have, and has never sought, Congressional authority to fund community sound attenuation. FEIS at 4.8-4. By way of contrast, the memorandum then discusses the FAA's federally-funded mitigation plan, which allows a homeowner to obtain Federal Airport Improvement Funds for seventy-five to ninety percent of noise mitigation costs, with the remainder borne by the (private) airport operator. Id.; AR 50502-06 (overview of FAA's Airport Noise Compatibility Program attached to CNO memorandum). The numerical analysis section follows the section on mitigation measures available to the FAA, and is clearly a worst case estimate of attenuation costs that would occur if the Navy had the same kind of authority as the FAA to provide federal funds for sound attenuation. NEPA, however, does not require agencies to conduct a worst case analysis, especially for mitigation measures outside the agency's control. Methow Valley Citizens Council, 490 U.S. at 354. **[\*\*43]**

n14 It would be well-nigh impossible for the Navy to determine how many of the over 33,000 homes would require sound attenuation. This is not a case of a new airfield being constructed or an older field undergoing significant expansion, such that residences and other buildings are being affected for the very first time. Instead, NAS Oceana has existed for over four decades. Much of the growth and development around NAS Oceana occurred in the last twenty years, a time when, as the 1978 AICUZ contours demonstrate, aviation activity at NAS Oceana was at a fever pitch. It is entirely possible that many of the homes constructed during this time frame were built with sufficient attenuation measures, and there would be no utility in taking any additional mitigation measures.

n15 See supra notes 13 and 14 and accompanying text.

----- End Footnotes-----

With respect to plaintiff's property value argument, the Navy again claims it was not required to discuss the impact of the aircraft transfer on property values because, as with the mitigation costs, determining the impact is too speculative. See Town of Norfolk v. EPA, 761 F. Supp. 867, 887 (D. Mass. 1991) (holding that the failure to place a dollar value on possible decrease in property value was not unreasonable); Olmsted Citizens for a Better Community v. United States, 606 F. Supp. 964, 974 (D. Minn. 1985) (stating that there is no requirement to discuss non-physical impact such as property values). In this case, not only did the Navy explain the uncertainty surrounding attempts to measure the effect on property values, n16 but plaintiff's own evidence also supports the Navy's argument on this issue.

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n16 In response to comments on the DEIS, the Navy stated:

Property values are determined by a combination of neighborhood characteristics (e.g., the quality of local schools, local property taxes, access to transportation, and the crime rate) and individual housing characteristics (e.g., age of the house, number of rooms, and amenities such as garages). There are no definitive federal standards for quantifying the impact of aircraft noise on property values. Therefore, we cannot quantify whether the increase in noise will affect property values.

FEIS at A-5-118.

----- End Footnotes----- **[\*\*45]**

Plaintiff's rely on an FAA study titled Aviation Noise Effects, Report No. FAA-EE-85-2 (Plaintiff's Exhibit 60). The study concluded that noise decreases property values by "only a small amount - approximately [one percent] decrease per decibel (DNL)." *Id.* at 101 (emphasis added). The report noted that the loss was equivalent to the cost of moving to a new home. The report went on to state that aircraft noise "is just one of the considerations" affecting the value of a home. *Id.* Among the "many other factors that affect the price and desirability of a residence," are size of house, number of rooms, air conditioning, distance from business district, and the number of lakes, parks, and other recreational areas nearby.

Id. at 100-01. Moreover, the report also notes that any negative price effect from aircraft noise is often counterbalanced by having close proximity to the airport for transportation or employment. Id. at 99. In this particular case, closeness to NAS Oceana and/or NALF Fentress may indeed be a benefit to service members who move to Virginia Beach or Chesapeake and may be willing to put up with some additional aircraft noise in order to have a **[\*\*46]** short commute to work. In any event, the FAA **[\*599]** report serves to confirm the gist of the government's argument that it is too difficult to evaluate the precise effect of the additional aircraft noise on property values. n17 Accordingly, the court finds that the Navy was not arbitrary and capricious in failing to discuss the impact on property values in more detail.

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n17 The difficulty raised by trying to estimate an effect on property values is further compounded by the context of this case. When NAS Oceana was first established decades ago, it was relatively isolated. Only in the last twenty years or so, as plaintiff points out, has there been substantial encroachment on the areas surrounding NAS Oceana. Here, where the airfield existed before a large majority of the affected homes, it would seem that any diminution in value was built into the cost of the home to begin with. Thus, to the extent that the arrival of the F/A-18s will only cause the noise contours to expand slightly beyond the 1978 contours, it is not clear that the arrival of the F/A-18s will have any effect on property values. If anything, given the fact that the retirement of the A-6 led to a drawdown in personnel at NAS Oceana, it is just as likely that home values will actually increase, not decrease, as the influx of Navy personnel from NAS Cecil Field fuels competition for single family homes in the areas surrounding NAS Oceana and NALF Fentress.

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#### 4. Safety Risks

Plaintiff next asserts that the FEIS inadequately examined the safety risks of the aircraft transfer. Plaintiff claims that, rather than use Accident Potential Zones ("APZs") to measure the safety risk of aircraft crashes, the Navy should have used other criteria such as accidents per operational hour to calculate the probability of an accident occurring in a populated area and the probability of any resulting casualties or damages. Plaintiff also claims the safety analysis in the FEIS fails to make a comparative analysis of the risks associated with each realignment scenario. Plaintiff's arguments, however, fail both as a matter of law and as a matter of fact.

First, the court reiterates <sup>HN9</sup> that questions of methodology are within an agency's discretion. See, e.g., Valley Citizens, 886 F.2d at 469. So long as the method chosen reasonably informs the decisionmaker and the public of potential environmental impacts and allows appropriate comparison between alternatives, the FEIS is adequately prepared. Id. at 460. In this case, the Navy chose to use APZs as the vehicle by which it measured the safety risks around the air stations in each realignment scenario. **[\*\*48]** Rather than use generic aircraft accident rate statistics as argued for by plaintiff, the Navy chose to concentrate its resources on developing a safety analysis for those areas closest to each air station. As the ROD and FEIS both indicate, individuals living within an APZ have a greater risk of being affected by an aircraft accident than those outside APZs. ROD at 9-10; FEIS at 3.1-79. See FEIS at Appendix G (detailing methodology used to create APZs). The analysis contained in the FEIS, however, does not stop at such a conclusory allegation. As with the noise contours discussed above, the FEIS also compared the projected APZ contours after the F/A-18s'

arrival with the pre-arrival APZ, and concluded that there would be a significant increase in land area and population within the revised APZ. FEIS at 4.4-3 to 4.4-7; *id.* at Figures 4.4-3 to 4.4-6. Thus, there is no colorable claim that the FEIS failed to adequately inform the decisionmaker of the large population that would be subjected to an increased risk of an aircraft crash as a result of the F/A-18 transfer.

Second, it is not clear to the court that the methodology proposed by plaintiff would result in a more detailed **[\*\*49]** analysis. In fact, it seems likely that plaintiff's proposal would yield a less detailed, therefore less useful, analysis. Plaintiff faults the Navy for not basing its safety analysis on the number of accidents per operational hour. However, no matter what that figure, if the accident per operational hour rate was applied to all of the areas surrounding the air stations, including those **[\*600]** outside APZs, the result would be a uniform, and statistically insignificant, crash probability. In other words, use of such a generic measure applied to a greater area does not account for the fact that a majority of aircraft accidents near airfields occur in the airfield landing and takeoff patterns. This greater risk was not only well-documented in the FEIS, see FEIS at Appendix G, but was also specifically acknowledged by plaintiff. Memorandum in Support of Plaintiff's Motion for A Preliminary Injunction And in Support of Motion for Summary Judgment at 37-38 (discussing placement of shopping mall at dangerous point in NAS Oceana traffic pattern and fact that forty-one percent land use in APZs around NAS Oceana is residential housing).

Plaintiff expends a great deal of effort explaining how **[\*\*50]** the Navy has vigorously opposed encroachment on the NAS Oceana APZs over the last twenty years, especially in 1976 with regards to the construction of a local shopping mall. As plaintiff's brief points out, the mall was located in the landing pattern for NAS Oceana, precisely at a "place where [crashes are] more likely to happen," because "that's where a lot of accidents occur around airfields." *Id.* at 38 (quoting the statement of a former NAS Oceana commanding officer in a local newspaper). Far from pointing out any error in the Navy's methodology, this portion of plaintiff's argument directly supports the importance of the methodology used by the Navy and the significant distinction between areas inside and outside an APZ.

Finally, plaintiff attempts to argue that a supplemental FEIS should be prepared based on the fact that four months after the FEIS was completed, the Chief of Naval Operations reported to Congress that there was an eighty-two percent increase in the aviation mishap rate for the previous year. Plaintiff, however, fails to demonstrate the relevance of this single statistic, taken out of context, to the inquiry before the court. There is no indication whether **[\*\*51]** any portion of the increase was attributable to F/A-18 operations, or where the increase in crashes occurred, *i.e.*, near airfields, over land but not near airfields, or at sea from aircraft carriers. As a result, there is no indication that this "new" information would have any bearing on the safety analysis used by the Navy, which used aircraft crash data over a thirty year period. One anomalous year, which "followed a long-term downward trend in aviation mishaps, reaching a new low [the year before the increase]," Plaintiff's Exhibit 89, at 4 (statement of Admiral Jay L. Johnson, Chief of Naval Operations, before the Senate Armed Services Committee, September 29, 1998), simply has no significant impact on the environmental study conducted by the Navy.

Plaintiff's other arguments on this issue are either contrary to the record or have no merit. n18 Accordingly, the court finds that the FEIS adequately addressed the safety risks of the F/A-18 transfer.

- - - - - Footnotes - - - - -

n18 For instance, plaintiff argues that the FEIS failed to reveal the consequences of an aircraft crash near NAS Oceana to the decisionmaker and the public because the FEIS does not discuss the availability of medical care, hospitals, and emergency or disaster assistance

to respond to a crash. However, as the Navy points out, the FEIS contains a detailed discussion of fire and emergency services available both on base, and in the Cities of Virginia Beach and Chesapeake, FEIS at 3.1-107 to 3.1-110, as well as available medical facilities. FEIS at 3.1-112 to 3.1-113.

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5. Air Quality Impacts

Although plaintiff has raised a number of arguments about the air quality discussion contained in the FEIS, most of those arguments are not relevant to the question before the court. n19 Instead, most **[\*601]** of plaintiff's arguments, to the extent that they have validity at all, n20 do not indicate a failure to comply with NEPA at all, but, instead, involve compliance with the Clean Air Act, which is not at issue in the current action. <sup>HN107</sup>NEPA does not impose a requirement on government agencies to comply with the provisions of the Clean Air Act. See Conservation Law Foundation v. Busey, 79 F.3d 1250, 1262 (1st Cir. 1996) (stating that there is "no connection between NEPA and Clean Air Act compliance"). Under NEPA, an agency is only required to describe and analyze the adverse effects on the human environment. In the air quality context, as long as the FEIS reasonably describes the change in pollutants that will result from a proposed action, and does so without any significant errors, the FEIS is adequate. Valley Citizens, 886 F.2d at 467 (holding that omission of over fifty tons of nitrous oxides from air quality analysis was not significant enough **[\*\*53]** to require the Air Force to redo environmental impact study). Essentially, the air pollution described in a FEIS can be well in excess of Clean Air Act limits, but so long as the pollutant amounts were calculated without a significant error, NEPA is satisfied, even though the provisions of the Clean Air Act may not be.

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n19 Plaintiff's inapplicable arguments are: the FEIS was inadequate because it failed to disclose the amount and impact of air emissions offsets from two Hampton Roads emission sources that were used in the State Implementation Plan and the resulting economic impact of NAS Oceana's use of that offset; the FEIS erred by analyzing the air quality impact on the Hampton Roads Air Quality Control Region, and not the area immediately surrounding NAS Oceana and NALF Fentress; and the FEIS does not discuss the consequences of more restrictive air quality standards recently approved by the EPA.

n20 For example, regulations promulgated as a result of the Clean Air Act specifically permit the use of offsets to determine conformity with State Implementation Plans. 40 C.F.R. § 93.158(a)(2). Thus, plaintiff's argument on this point is meritless. Likewise, plaintiff's argument with respect to the Navy's failure to conform to more restrictive air quality standards recently approved by the EPA is without merit, given the uncertainty surrounding the eventual implementation of those standards. See American Trucking Ass'ns, Inc. v. United States EPA, 1999 U.S. App. LEXIS 9064, 1999 WL 300618, at \*27 (D.C. Cir. May 14, 1999) (holding that EPA was arbitrary and capricious in selection of portion of the new standards for coarse particulate matter and remanding case to the EPA "for further consideration of all standards at issue" in light of panel majority's holding that EPA's construction of Clean Air Act constituted unconstitutional delegation of legislative power).

----- End Footnotes----- **[\*\*54]**

In this case, the plaintiff only raises one argument that challenges the accuracy of the data published in the FEIS. Although not challenging the methodology used in the Navy's air quality analysis, plaintiff claims that the administrative record reveals that changes were made to the model input data, which resulted in a significant decrease in the amount of ozone precursor emissions. However, other than picking isolated spots in the administrative record that discuss possibly changing an assumption related to the input data, plaintiff fails to demonstrate error in the use of the changed assumption or the ultimate result. Plaintiff's selective use of the administrative record fails to recognize that the Navy was continually refining its methodology in order to ensure the most accurate emissions estimate. Plaintiff would lead the court to believe that the refining process only yielded one result: a decrease in the emissions amount. A glance at the very portions of the administrative record relied on by plaintiff is sufficient to demonstrate that, in fact, it was a two-way ratchet, because some of the changed input data actually led to increases in pollutant emissions. See AR 21521 **[\*\*55]** (stating that there needs to be differentiation between different engines used in two versions of the F-14 because of different fuel emission rates, and the one used in early analysis had lower emission rate); AR 21522 (stating that emission indexes for E-2 aircraft, which conduct FCLPs at NALF Fentress, were low and offering higher, corrected numbers; stating that number of touch and go approaches appears low); AR 21523 (stating that Time in Mode figures used for E-2 aircraft were low, with correction resulting in increase in emissions); AR 29962 (stating that after adjustment of air-to-air/air-to-ground mission ratios, there was an increase of sixty flights over **[\*602]** eighteen month workup period). Moreover, it is not clear to the court that any of the changed assumptions cited by plaintiff were erroneous. See, e.g., AR 29961 (stating that the number of nighttime FCLP passes needed to be reduced from eight to six because of fuel constraints resulting from the longer nighttime FCLP pattern; number of daytime passes remained eight); AR 43242 (stating that overhead break to landing was not included in air emissions analysis because comparable numbers were not available for 1993, which **[\*\*56]** was the base year for comparison).

A fair reading of the administrative record indicates that over the two-year period leading up to publication of the FEIS, the Navy made an extensive effort to ensure the correctness of its air emissions analysis. The fact that there were changes in assumptions and model input data is only to be expected where the pieces of information required to put the air quality study together had to be gathered from many different places in a far-reaching, large organization, such as the Navy.

Plaintiff has not conducted the type of analysis required to carry its burden of proof on this point. <sup>HN11</sup> The burden on plaintiff is not just to point out possible errors in the agency's assumptions and methodology, but to demonstrate how and why the FEIS was erroneous. See Conservation Law Foundation v. Andrus, 623 F.2d 712, 719 (1st Cir. 1979) (requiring a defect in an environmental impact statement to be demonstrated before court will review sufficiency of defect). Only after such a demonstration can the reviewing court determine whether the alleged error in the FEIS was significant enough to find that the agency acted arbitrarily or capriciously. See Valley Citizens, **[\*\*57]** 886 F.2d at 463. Plaintiff has simply not alleged any such defect in this case.

Finally, plaintiff argues that, even if the Navy's conformity analysis is accurate, the FEIS failed to discuss the health effects of an increase in emissions on the population surrounding NAS Oceana and NALF Fentress. Plaintiff, without citation to any supporting authority, claims that it is not enough that the Navy demonstrate compliance with the air quality standards established by the Clean Air Act, but must also separately analyze any potential health effects on the local population. However, given the purpose and structure of the Clean Air Act, such an analysis appears to be obviated, where, as in this case, a proposed action is in conformity with the maintenance plan for an attainment area.

The purpose of the Clean Air Act is "to protect and enhance the Nation's air quality, to initiate

and accelerate a national program of research and development designed to control air pollution, to provide technical and financial assistance to the States in the execution of pollution control programs, and to encourage the development of regional pollution control programs." Conservation Law Foundation v. Busey, [**\*\*58**] 864 F. Supp. 265, 273 (D.N.H. 1994) (citing 42 U.S.C. § 7401(b)). To this end, the Clean Air Act authorized the EPA to establish ambient air quality standards necessary to "protect the public health." 42 U.S.C. § 7409(b)(1) (1994). As a result, the EPA promulgated National Ambient Air Quality Standards ("NAAQS"), which establish the maximum limits of pollutants allowed in the outside ambient air. The EPA designates air quality control regions around the country as either having attained the NAAQS ("attainment"), not attained the standards ("nonattainment"), or as unclassified because there is not enough information available to make an attainment determination. When an air quality control region reaches attainment status, it is then required to use the State Implementation Plan to maintain attainment.

On June 26, 1996, the Hampton Roads Air Quality Control Region was redesignated by the EPA from marginal [**\*\*603**] nonattainment to attainment for ozone. n21 By this certification, the EPA signified that the air quality standards in the Hampton Roads region were below that which posed any threat to public health. In June, 1997, the EPA approved the state of Virginia's maintenance plan for the [**\*\*59**] Hampton Roads Air Quality Control Region, indicating that the EPA believed that the plan would allow the region to remain below the NAAQS, and, therefore, below the level at which pollutants would form any threat to public health. In the maintenance plan, the state of Virginia specifically provided an emissions allotment for NAS Oceana that included the possibility of moving the F/A-18 aircraft to NAS Oceana. Because the FEIS determined that the emission levels of ozone precursors were well within the allocation provided in the maintenance plan, the relocation of the F/A-18 aircraft would not return the Hampton Roads Air Quality Control Region above a level posing a threat to public health. As a result, there was simply no health risk for the Navy to discuss in the FEIS. Accordingly, the court finds that the Navy did not act arbitrarily or capriciously in failing to discuss the health effects of the additional pollutants given the fact that the air impact analysis indicated that the proposed action was in conformity with a state maintenance plan for an area in attainment status for all the relevant pollutants.

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n21 The Region was already in attainment for all other pertinent pollutants.

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#### 6. Mitigation Measures

Plaintiff also argues that the FEIS failed to adequately address potential means of mitigating the adverse environmental consequences of moving the aircraft to NAS Oceana. Specifically, plaintiff asserts that the Navy failed to examine and discuss the feasibility of constructing an additional outlying airfield for NAS Oceana. According to plaintiff, a new outlying airfield would result in a substantial decrease in air operations, and their attendant noise, safety, and air quality impacts, around NAS Oceana. Plaintiff also faults the FEIS for failing to fully discuss possible noise mitigation that could be accomplished through a complete review of flight procedures at NAS Oceana and NALF Fentress.

<sup>HN12</sup> ¶ Because NEPA requires agencies to examine the adverse environmental effects of proposed actions, there is an implicit requirement that the FEIS also discuss efforts to avoid those adverse effects. Methow Valley Citizens Council, 490 U.S. at 351-52. NEPA specifically

requires agencies to examine possible mitigation measures in the FEIS. 40 C.F.R. § 1502.14 (f); id. at § 1502.16(h). However, because NEPA does not require detailed explanations of possible **[\*\*61]** mitigation efforts, there does not need to be a fully-developed mitigation plan presented in the FEIS. Methow Valley Citizens Council, 490 U.S. at 353. In fact, because it is only procedural and not substantive in nature, NEPA does not require agencies to implement any of the mitigation measures discussed in the FEIS. Id.

In developing the alternative realignment scenarios, one of the screening criteria used by the Navy was the existence of outlying airfields within fifty nautical miles of the main base. NAS Oceana survived the screening process, in part, because it had just such a field, NALF Fentress, well within the fifty nautical mile limit. As such, plaintiff's argument that the Navy failed to discuss the mitigation that could occur through construction of an additional outlying airfield is misplaced. NAS Oceana already has an outlying airfield for conducting the noisy and repetitive field carrier landing practices required before deployment aboard aircraft carriers. Plaintiff would have the Navy discuss building a second outlying field near NAS Oceana, a requirement that is not imposed on any of the other air stations discussed in the FEIS. As a result, the court finds **[\*\*62]** that the Navy was not **[\*604]** arbitrary and capricious for failing to discuss the possibility of constructing a second outlying field as a mitigation measure for NAS Oceana.

The court also finds no error in the Navy's discussion of noise mitigation measures at NAS Oceana. Contrary to plaintiff's assertion, the FEIS clearly indicates that the Navy did, in fact, completely review flight operations and procedures at NAS Oceana. FEIS at 4.8-12. n22 From this review, the Navy developed a number of very specific mitigation measures that it implemented at NAS Oceana, including the elimination of engine maintenance runs after 11:00 p.m., changes in takeoff procedures and late-night arrival procedures, and establishing a navigational aid at NALF Fentress to aid pilots in flying the FCLP pattern there. FEIS at 4.8-13. The FEIS also identified additional mitigation measures that would be undertaken in the event that the recommended ARS (ARS 1) was selected. FEIS at 4.8-14.

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n22 The FEIS states that the Navy conducted a complete review of aircraft arrival and departure procedures, airfield hours of operation, pattern altitudes, aircraft power settings, flight tracks, and aircraft maintenance runup times. FEIS at 4.8-12. Other than a blanket assertion that a "bottoms up" review of flight procedures is needed, plaintiff fails to identify any specific areas that the Navy should have examined, but failed to do so. It seems clear to the court that the Navy did, in fact, conduct exactly the type of thorough review of flight operations sought by plaintiff.

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Accordingly, the court finds that the FEIS adequately discussed possible mitigation measures that could be undertaken at NAS Oceana.

7. Environmental Justice

In accordance with Executive Order 12898, the Navy conducted an environmental justice analysis of the realignment scenarios and included this analysis in the FEIS. n23 Plaintiff contends that this analysis was flawed because the Navy used different population figures in the environmental justice portion of the FEIS than it did in the FEIS section on noise impacts. <sup>HN13</sup> However, NEPA does not require an environmental justice analysis, and, as the Navy correctly points out, Executive Order 12898 specifically states that any agency actions taken pursuant to the provisions of the Order are not subject to judicial review. Exec. Order

12,898, 59 Fed. Reg. 7,629 (1994) ("This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order."); see Morongo Band of Mission Indians, 161 F.3d at 575. Because the court does not have jurisdiction to review this portion of the FEIS, the merits of plaintiff's **[\*\*64]** argument are not addressed.

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n23 <sup>HN14</sup> Executive Order 12898 states that Federal agencies

whenever practicable and appropriate, shall collect, maintain and analyze information on the race, national origin, income level, and other readily accessible and appropriate information for areas surrounding facilities or sites expected to have a substantial environmental, human health, or economic effect on the surrounding populations, when such facilities or sites become the subject of a substantial Federal environmental administrative or judicial action.

Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (1994).

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### 8. Cumulative Impacts

<sup>HN15</sup> When designing the scope of the environmental impact study, an agency must include cumulative actions, which are those that "when viewed with other proposed actions have cumulatively significant impacts." 40 C.F.R. § 1508.25(a)(2) (emphasis added). Significant cumulative impacts occur if the current action, when added to past, present, and reasonably foreseeable future actions, **[\*\*65]** results in significant adverse effects on the human environment. 40 C.F.R. § 1502.22; *id.* at § 1508.7 (defining "cumulative impacts"). When evaluating cumulative impacts, the agency must clearly indicate any incomplete or unavailable information that prevents a complete **[\*605]** evaluation of the environmental impacts. 40 C.F.R. § 1502.22.

The FEIS at issue here contained a substantial discussion of cumulative impacts. The cumulative impact section specifically examined military and civilian airspace use around the three air stations, personnel relocations as a result of the realignment decision, and general growth trends in the regions around NAS Oceana, MCAS Beaufort, and MCAS Cherry Point. The FEIS also acknowledged that the realignment decision "could be cumulatively impacted" by the replacement of the F/A-18 C/D aircraft being relocated to NAS Oceana, along with the F-14 aircraft currently at NAS Oceana, because "it is reasonably foreseeable" that those aircraft would be replaced by a different series of F/A-18 aircraft, the F/A-18 E/F. FEIS at 9.1-7. However, the FEIS also indicated that if any such proposal was made, it would occur at some unknown time in the future, at which **[\*\*66]** time another EIS would be developed in accordance with NEPA. *Id.* The Navy did not stop its discussion of the E/F at this point, though, but went on to detail some of the expected changes that could result from the E/F aircraft and discuss the reasons why a complete evaluation of the environmental impact was not possible in the current FEIS.

According to the FEIS, as a general matter the E/F aircraft will emit approximately fifty-five

percent more nitrous oxides than C/D aircraft under the same operating conditions. FEIS at 9.1-14. Compared to the F-14s, the E/F aircraft will produce twenty-eight percent fewer nitrous oxide emissions. Id. However, the FEIS indicates that a complete analysis of the air quality impact of the E/F aircraft was not possible because the future mix of E/F and C/D aircraft at NAS Oceana is unknown. In addition, emission estimates can only be developed for relocation sites after operating mode and time in mode scenarios are developed for each location, which is not yet possible given that the future aircraft mix is unknown. FEIS at 9.1-13. With respect to the possible noise impact of the E/F aircraft, the FEIS did indicate that there would be changes **[\*\*67]** in the noise contours around NAS Oceana and NALF Fentress. Again, however, the FEIS also indicated that the changes could not be precisely predicted because the future mix of aircraft sited at NAS Oceana is still unknown. Id. Based on a prototype E/F aircraft, the FEIS stated as a general matter that the E/F is quieter than the C/D version of the F/A-18 and noisier than the F-14. Id.

Plaintiff, however, argues that the cumulative impact discussion contained in the FEIS did not adequately address the future impact of the possible E/F replacement action. Plaintiff faults the Navy for not indicating in the FEIS when the E/F replacement is to occur, because plaintiff claims that the administrative record reveals that the E/F aircraft are scheduled to replace the F-14 aircraft beginning in 1999. Plaintiff's Exhibit 106.

However, as the government points out, plaintiff has not demonstrated that a formal proposal has been made to purchase and site the E/F aircraft at NAS Oceana. Plaintiff's reliance on programming and budgetary materials is not relevant, as those documents are only projections and, as plaintiff's own evidence demonstrates, are subject to the political process. n24 **[\*\*68]** <sup>HN16</sup> NEPA does not require **[\*606]** agencies to examine ethereal possibilities, but only future actions that have actually been proposed. North Carolina v. FAA, 957 F.2d 1125, 1131 (4th Cir. 1992). Plaintiff does not contest the government's assertion that the only F/A-18 E/F procurement decision that has been made involves siting the first 164 E/F aircraft purchased at NAS Lemoore in California. In point of fact, plaintiff's criticism of the FEIS in the instant case is premised in part on the fact that the Navy has gone through the NEPA process and published an EIS for the placement of E/F aircraft at NAS Lemoore. The key distinction between the two situations, however, is that the siting of F/A-18 E/F aircraft at NAS Lemoore is a formally proposed action, while there is not yet a formal proposal to site E/F aircraft at NAS Oceana.

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n24 As part of its reply brief, plaintiff submitted two articles from a Norfolk, Virginia, newspaper, purportedly to demonstrate that NAS Oceana is to be the principal base of the E/F version of the F/A-18. Dale Eisman, Congressional Critic Starts New Buzz About Super Hornet's Ability, *Virginian-Pilot*, Nov. 25, 1998; Dale Eisman, Navy Suspends Tests of New Fighter Due to Engine Crack, *Virginian-Pilot*, Dec. 12, 1998. However, both articles indicate that there are potentially serious performance problems in the F/A-18 E/F. The November 25, 1998, article also makes it clear that Congress has only approved the purchase of sixty-two aircraft so far. The aircraft's performance problems have also led to a certain degree of congressional opposition. For instance, Senator Russ Feingold asked the Department of Defense to freeze the 1999 appropriation for thirty aircraft until the performance problems are solved. Eisman, Congressional Critic Starts New Buzz About Super Hornet's Ability, *Virginian-Pilot*, Nov. 25, 1998. Thus, at this early stage of the procurement process, it is far from certain that the Navy will acquire the number of F/A-18 E/F aircraft slated to be stationed at NAS Lemoore, much less the number of aircraft that would be required to replace the F-14 and F/A-18 C/D aircraft at NAS Oceana at some unknown point in the future.

----- End Footnotes----- **[\*\*69]**

Given the uncertainties surrounding the future procurement of F/A-18 E/F aircraft, the timing of the F-14 replacement, the eventual mix of C/D aircraft with E/F aircraft at NAS Oceana, and the likelihood that the E/F aircraft will have a minimal impact on the environment, n25 the court finds that the Navy did not act arbitrarily and capriciously in not fully discussing the possible cumulative impact of replacing the F/A-18 C/D with F/A-18 E/F aircraft. n26

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n25 In arguing that the Navy has considered the environmental impact of the E/F at air stations on the West Coast, plaintiff submitted a copy of "Final Environmental Impact Statement for Development of Facilities to Support Basing US Pacific Fleet F/A-18E/F Aircraft on the West Coast of the United States." (Plaintiff's Exhibit 58). That exhibit states that there will be a "less than significant" noise impact at NAS Lemoore as a result of the arrival of the F/A-18 E/F. The exhibit goes on to state

Because it has a more powerful engine, the F/A-18E/F aircraft can maintain a given set of flight conditions at lower power settings than can existing F/A-18C/D aircraft. The F/A-18E/F aircraft is quieter than the existing F/A-18C/D aircraft during takeoffs, climbouts, and high power flight conditions. The F/A-18E/F aircraft is noisier than the existing F/A-18C/D aircraft during landing approaches and low power flight conditions.

Thus, for half the time around an airfield, the E/F is louder than the C/D and for the other half of the time it is quieter than the C/D, probably resulting in a minimal or zero increase in noise impact in the profiles of the NAS Oceana FEIS. **[\*\*70]**

n26 Although the court finds that the FEIS adequately addressed cumulative impacts, even if the court found that the Navy erred, such error would be harmless. The remedy available to the court would be to order the Navy to prepare a supplemental environmental impact statement. However, from the record before the court, it is clear that the Navy is already planning to perform such an analysis in the future. Ordering such an analysis at this time would be duplicative and place an onerous burden on the Navy, one that NEPA does not require. North Carolina v. FAA, 957 F.2d at 1131.

----- End Footnotes-----

### 9. Compliance With NEPA

Finally, Plaintiff asserts that the Navy did not comply with the requirements of NEPA in good faith because, contrary to the contention in the FEIS, the Navy made a decision to send all of the F/A-18s to NAS Oceana before the NEPA process was even started. n27 However, the **[\*607]** isolated excerpts that plaintiff cites from the administrative record do not support this contention.

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n27 Defendant's rejoinder to this argument is that the ultimate decision did not, in fact, place all of the F/A-18s at NAS Oceana, but instead split them up between NAS Oceana and MCAS Beaufort (ARS 2). Although claiming that the ultimate decision was made for political expediency, Memorandum in Support of Plaintiff's Motion for a Preliminary Injunction and in Support of Motion for Summary Judgment at 7, plaintiff offers no proof, either inside or outside the administrative record, to this effect.

- - - - - End Footnotes- - - - - **[\*\*71]**

Plaintiff first claims that this argument is supported by a letter written by Senator John Warner of Virginia, in which Senator Warner requests that the move of the F/A-18s to NAS Oceana be expedited. However, Senator Warner is not a Navy official and therefore his statements are not relevant to the state of mind of the Navy decisionmakers. Even if that fact is set aside, though, Senator Warner's letter is not inconsistent with the FEIS. As previously discussed, the 1995 **BRAC** report clearly indicated that at least some portion of the F/A-18s were going to be transferred to NAS Oceana because it was the base with the most excess capacity. The court has already held that it was reasonable for the Navy to include NAS Oceana as part of all five **realignment** scenarios. In this respect, Senator Warner's letter was simply an attempt to expedite the movement of whatever F/A-18s were going to be transferred to NAS Oceana.

In any event, the Navy did not bypass the EIS process to expedite the selection process. In fact, as detailed throughout this opinion, the Navy conducted an exhaustive and thorough study of the environmental impact of the F/A-18 transfer, compiling an administrative record **[\*\*72]** in excess of 51,000 pages in the process and issuing a remarkably detailed FEIS filling three large binders.

Plaintiff then focuses on a lone e-mail to prove that the move of all the aircraft to NAS Oceana was preordained. AR 021784. In the e-mail, Brigadier General Braaten told Lieutenant General Brabham that the Navy was sending analysts to collect information at MCAS Cherry Point and MCAS Beaufort for use in the EIS, but that the Navy had no intention of using the Marine Corps' two air stations for the F/A-18s. According to the e-mail, the source for this information was Rear Admiral Lou Smith. Despite the hearsay problem with this document, there is no indication that the Navy had preordained the decision to send all of the F/A-18s to NAS Oceana. None of the individuals mentioned in the e-mail was the agency's final decisionmaker on this issue. At most, this lone e-mail, extracted from an administrative record of over 51,000 pages, merely demonstrates that the Navy had a preferred alternative as it began the FEIS process.

**HN17** Under NEPA, however, it is often the case that an agency will have a preferred alternative, perhaps even a specific proposal, going into the EIS process. **[\*\*73]** See 40 C.F.R. § 1502.2(g); *id.* at § 1502.4(a). In fact, it would be the unusual case for an agency not to have such a proposal, because it is often the agency's proposed action that trigger's the NEPA process. Methow Valley Citizens Council, 490 U.S. at 349. In such a case, NEPA only requires that the ultimate decisionmaker remain open to reconsidering any or all aspects of the proposed action based on the environmental impact identified in the FEIS. See Methow Valley Citizens Council, 490 U.S. at 351 ("NEPA merely prohibits uninformed-rather than unwise-agency action"); Environmental Defense Fund, Inc. v. Corps of Engineers, 492 F.2d 1123, 1129 (5th Cir. 1974) (stating that letters purporting to show agency acted perfunctorily "do not necessarily establish that the . . . decision to go ahead with the project would not be reconsidered"). A review of the entire record, and not just a few selective portions cited by plaintiff, reveals that while the Navy may have had a preferred alternative going into the NEPA process, the outcome was not preordained.

In this case, plaintiff points to no evidence in the administrative record indicating that the ultimate decisionmaker, **[\*\*74]** Duncan Holaday, Deputy Assistant Secretary of the Navy (Installations and Facilities), ever concluded before the completion of the FEIS that all of the F/A-18s would be relocated to NAS Oceana. Nor does plaintiff offer any evidence to demonstrate that **[\*608]** the Navy's preferred alternative would not be reconsidered based on any environmental concerns raised in the FEIS. Instead, as defendants contend, plaintiff's argument is utterly refuted by the fact that the ROD did not select ARS 1, the Navy's preferred alternative, but, instead, chose an alternative that allowed the Navy to use MCAS Beaufort's excess capacity and already extant F/A-18 training and maintenance facilities.

The court finds that the Navy conducted a thorough and exhaustive analysis of the environmental impact of the F/A-18 transfer and complied with the requirements of NEPA in all respects.

#### IV. Conclusion

Although plaintiff has engaged in an exercise of "chronic faultfinding," Coalition for Responsible Regional Development v. Coleman, 555 F.2d 398, 400 (4th Cir. 1977), plaintiff has failed to prove that the FEIS was inadequate in any respect, or that the decisionmaker did not have the information necessary to **[\*\*75]** make an informed decision. Accordingly, the court finds that the Navy's decision to transfer the F/A-18 aircraft from NAS Cecil Field to NAS Oceana and MCAS Beaufort was not arbitrary and capricious. Defendant's cross-motion for summary judgment is **GRANTED** and plaintiff's motions for summary judgment and a permanent injunction are **DENIED**.

The Clerk is **DIRECTED** to send a copy of this Opinion and Final Order to counsel for the parties.

It is so **ORDERED**.

Rebecca Beach Smith

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

May 19, 1999

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